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NO. 8781

United States Circuit Court of Appeals

For the Ninth Circuit

Vol 2098 see Vol 2097

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

JESSE H. SHREVE, ARCHIE C. SHREVE, DANIEL H. SHREVE, GLEN O. PERKINS AND W. C. EVANS,
Defendants and Appellants.

BRIEF OF APPELLANTS

JESSE H. SHREVE AND ARCHIE C. SHREVE

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STATUTES, CODES AND RULES

APPENDIX

NO. 8781

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BRIEF OF APPELLANTS

JESSE H. SHREVE AND ARCHIE C. SHREVE

SUMMARY STATEMENT OF CASE

This cause is now on appeal for the second time. On the former trial the judgments were reversed and a new trial ordered. *Shreve vs. U. S.*, 77 Fed. (2nd) 2, decided April 29, 1935.

The defendants[1] were indicted by a grand jury of the United States for the District of Arizona on December 23, 1933,[2] (R. 1 to 38) for a violation of Sec. 215 of the Criminal Code (Sec. 338, Title 18, USCA) and Sec. 37 of the Criminal Code (Sec. 88, Title 18, USCA), commonly referred to in order named as the "mail fraud" and "conspiracy" statutes. The indictment is in twelve counts, the first eleven charging use of the mails in furtherance of schemes

1. Appellants will be referred to as "defendants" and appellee as "Government".

2. Defendants were previously indicted (Feb. 22, 1933) for violation of the same statutes, but a demurrer was sustained to that indictment during the taking of testimony on the trial.

to defraud, and the twelfth, a conspiracy to violate the remaining eleven counts of the indictment (R. 1).

On February 13, 1934, the cause first came on for trial before Honorable Albert M. Sames, and a jury, in the United States District Court at Tucson, and the defendants Jesse H. Shreve, Archie C. Shreve and Daniel H. Shreve were convicted upon the first eleven counts of the indictment and the jury disagreed upon the twelfth count; the defendant Glen O. Perkins was convicted upon the first four counts of the indictment; and the defendant W. C. Evans was convicted upon counts one and four of the indictment (R. 180). As stated above, upon appeal these judgments of conviction were reversed.

The cause came on for retrial on January 11, 1938, as to the defendants Jesse H. Shreve and Archie C. Shreve only, before Honorable Dave W. Ling and a jury, at Phoenix, Honorable Albert M. Sames having accepted a disqualification to retry the cause (R. 180).

Previous to the retrial of the cause, the defendant Daniel H. Shreve died, and the action was abated as to him (R. 181). The defendant Perkins was granted a severance after the former judgment of conviction was reversed and before the retrial of the cause (R. 181). He testified as a witness for the Government (R. 557). During this interim the indictment was dismissed as to the defendant Evans (R. 181). He also testified as a witness for the Government (R. 303).

At the time the cause was called for retrial, the twelfth count of the indictment (conspiracy count) was dismissed upon motion of the United States Attorney (R. 182). The defendants Jesse H. Shreve and Archie C. Shreve were again convicted upon the

eleven remaining counts of the indictment (R. 135, 136) and sentenced to four years imprisonment upon each count, sentence upon each count to run concurrently (R. 180).

The sufficiency of the evidence to sustain the verdicts is questioned in the particular that the evidence is insufficient to prove that these defendants mailed the indictment letters. All the evidence is therefore included in the bill of exceptions (R. 902). The entire charge of the Court is also included, because objection is made to some of the Court's instructions (R. 849).

STATEMENT AS TO JURISDICTION

This is a criminal case instituted in the United States District Court for the District of Arizona by a grand jury indictment charging defendants with a violation of Sec. 215 of the Criminal Code (Sec. 338, Title 18, USCA) and Sec. 37 of the Criminal Code (Sec. 88, Title 18, USCA). The jurisdiction of the Court below was invoked under Secs. 41 and 371, Title 28, USCA. The jurisdiction of this Court is invoked under Sec. 225, Title 28, USCA, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The Indictment

The first count (R. 1) of the indictment sets forth schemes to defraud by false pretenses and representations alleged to have been made by defendants in connection with a corporation organized under the laws of Arizona known as Security Building and Loan Association. The indictment alleges that, in carrying out the schemes set forth in this count, defendants would cause this corporation to be

organized and would maintain complete control of it, causing it to engage in the business of receiving deposits, issuing so-called pass books and investment certificates to depositors by solicitation and invitation, and that for the purpose of inducing such deposits, defendants would falsely pretend that the depositors' money could be safely and profitably invested; that such deposits would be secured by guaranteed capital and by first mortgages on Arizona real estate; that the association would pay six per cent interest on such deposits; that such deposits could be withdrawn, in whole or in part, at any time: that such deposits would be safely invested; that such deposits would be invested in sound mortgages on improved real estate carefully selected; that $300,000.00 of the capital stock of the association had been paid in, whereas the paid-in capital stock never exceeded $45,000.00; and that by means of such false pretenses large sums of money were obtained and deposited with the association. The indictment then alleges that defendants, for the purpose of executing such schemes, mailed the letters set forth in the first three counts of the indictment to the persons named therein (R. 6, 10, 12).

The fourth count (R. 14) of the indictment sets forth schemes to defraud, by pretenses and representations alleged to have been made by defendants, in connection with two corporations also organized under the laws of Arizona, known as Century Investment Trust and Arizona Holding Corporation. The indictment alleges that, in carrying out the schemes set forth in this count, defendants would cause Century Investment Trust to be organized and would maintain complete control of it and also Arizona Holding Corporation, theretofore organized under the laws of Arizona; that defendants would cause

Century Investment Trust to issue large amounts of its stock to defendants and to Arizona Holding Corporation; that defendants would cause these corporations to sell large amounts of stock to any and all persons who might be induced to purchase, and that for the purpose of obtaining money or property in exchange for such stock, defendants would falsely pretend that Century Investment Trust was in a solvent condition; that it was doing a large and profitable business; that it would have net earnings and income out of which dividends would be paid to stockholders; that dividends were paid out of net earnings and income when in fact they were paid out of capital supplied by defendants; and that by means of such false pretenses and representations large sums of money were obtained from the purchasers of such stock. The indictment then alleges that defendants, for the purpose of executing such schemes, mailed the letters set forth in the fourth and remaining counts of the indictment (R. 18 to 38).

The Facts

The Arizona Holding Corporation was organized in 1928 by defendant Glen O. Perkins for the purpose of raising funds to secure the capital required by the laws of Arizona to organize a building and loan association. The plan was conceived solely by Perkins (R. 630, 631). Difficulty was encountered in raising this capital and Perkins and one John C. Hobbs (who then had come into the venture) induced the defendants Jesse H. Shreve and Archie C. Shreve to associate themselves with it. L. C. James, Dr. C. A. Thomas and Dr. Bascom Morris originally interested themselves in Arizona Holding Corporation with Perkins and Hobbs, but they disposed of their interest to defendant Jesse H. Shreve, and his asso-

ciates, and withdrew from further participation in the company (R. 634). In March 1929, Security Building and Loan Association was organized for the purpose of carrying out the plan as conceived by Perkins (R. 212, 746). Difficulties were encountered in the operation of Arizona Holding Corporation. This prompted the organization of Century Investment Trust which was to own and control the stock of Security Building and Loan Association (R. 750). Approximately two years after its organization, Security Building and Loan Association became insolvent and ended in receivership. A like fate befell Arizona Holding Corporation and Century Investment Trust.

Evidence was introduced attempting to show that Arizona Holding Company, Century Investment Trust and Security Building and Loan Association were managed or controlled by defendants Jesse H. Shreve, Archie C. Shreve, Daniel H. Shreve (now deceased), Glen O. Perkins, and also John C. Hobbs who was not indicted. The indictment letters are signed by either Daniel H. Shreve, Glen O. Perkins, John C. Hobbs or R. F. Watt (R. 1 to 38). None is signed by defendants Jesse H. Shreve or Archie C. Shreve. The letter set forth in count one (R. 1), addressed to Fred Sweetland, enclosed a statement of the condition of Security Building and Loan Association as of December 31, 1930. The Government sought to show by Government witness-auditor Fierstone, that this statement was false, particularly as to the item of surplus and undivided profits (R. 692, 694). With one exception the indictment letters were mailed after the addressee named therein became investors with the companies to which the letter referred. That exception is the letter addressed to Mrs. Alice H. Davis (R. 29).

In a large part the evidence of the Government pertained to books of Arizona Holding Corporation, Century Investment Trust and Security Building and Loan Association, corporations named in the indictment. These books and records were audited by Government's witnesses Shroeder and Fierstone, both of whom were Federal agents doing accounting work (R. 654, 688). By summaries of these books, they sought to show that the indictment corporations were insolvent, and hence the pretenses and representations made by defendants with respect to the financial condition of these corporations were false.

The contentions of the Government, as we interpret the record, are:

First: The defendants Jesse H. Shreve and Archie C. Shreve, perceiving that Perkins and Hobbs had raised approximately $35,000 through sale of stock of Arizona Holding Corporation for the purpose of organizing a building and loan association, sought to divert that fund from the intended purpose of Perkins and Hobbs, and to this end secured $30,000 from the First National Bank of Prescott upon loans made by persons other than themselves, or the corporations involved[3]. The Government then sought to show that these individual loans were paid, not by the makers of the notes evidencing the loans, but by Security Building and Loan Association from funds deposited with it by Arizona Holding Corporation, these funds having been received by Arizona Holding Corporation as the result of a loan made by it to Overland Hotel and Investment Company, a corporation controlled by defendants Jesse H. Shreve and Archie C. Shreve[4]. Certificates of deposit totaling

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3. These notes were made by Joseph H. Shreve (a brother of defendants) Glen O. Perkins and J. G. Cash (R. 313, 314).

4. Testimony of Government's witness Schoeder (R. 687).

$50,000 were issued by the First National Bank of Prescott (R. 305, 306, 307).[5] They were made payable to the State Treasurer and were deposited with him for the purpose of securing the permit for Security Building and Loan Association to do business (R. 304). Subsequently these certificates of deposit were withdrawn and real estate mortgages and a surety bond substituted (R. 827). The certificates were then endorsed to Security Building and Loan Association (R. 306, 308). Thus, taking the Government's version of the case, Security Building and Loan Association repossessed this deposit, and Overland Hotel and Investment Company had secured a $30,000 loan from proceeds raised by the sale of stock of Arizona Holding Corporation.

Second: The Government relied greatly upon transactions reflected by deeds, mortgages, and assignments of mortgages, which were carried as assets upon the books of either Arizona Holding Corporation or Security Building and Loan Association. It was contended that no consideration passed between the parties thereto (R. 657 to 671).

Third: The ventures had their beginning in 1928. The principal operations were in the direful years 1930 and 1931. Arizona Holding Corporation, and its successor in purpose, Century Investment Trust, and Security Building and Loan Association failed in 1931 (R. 268, 272). The indictment alleges, and the Government sought to prove by the witness-auditors Schroeder and Fierstone that these companies were never solvent, and consequently the pretenses made by defendants, as set forth in the indictment, were false, and knowing they were false, defendants

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5. Of this amount $20,000 was deposited with First National Bank of Prescott by Arizona Holding Corporation (R. 309).

devised the schemes as alleged, and in furtherance of the schemes mailed the indictment letters.

QUESTIONS INVOLVED

1. Insufficiency of the indictment because of duplicity, which was raised by special demurrer (R. 40).

2. Insufficiency of the bill of particulars filed by the Government, which was raised by defendants' objection to the bill and motion to supplement it, which was denied (R. 85, 87).

3. Refusal to permit defendant Archie C. Shreve to testify on behalf of himself, and his co-defendant, with respect to conversations about which Governments' witnesses had testified, which was raised by objection by counsel for the Government (R. 761, 763, 764, 768, 769, 770, 779, 797).

4. Refusal to permit defendants to offer proof of the foregoing conversations, which was raised by the refusal of the trial judge himself to permit such offer of proof (R. 790, 791, 792, 793, 797).

5. Admissibility of exemplified copies of deeds, mortgages, and assignments of mortgages, which was raised by objection to their admission in evidence (R. 471, 472).

6. Admissibility of books and records of First National Bank of Prescott, which was raised by objection to the evidence (R. 300, 312, 313, 314, 318, 322, 334, 336, 338, 339).

7. Constitutionality of Section 695, Title 28, USCA, in its application to the admissibility of books and records of First National Bank of Prescott, which was raised by objection to the evidence (R. 300, 312, 313, 314).

8. Admission of books and records of Security

Building and Loan Association, Arizona Holding Corporation and Century Investment Trust, which was raised by objection to the evidence (R. 411).

9. Admission of testimony of Government witnesses based upon summaries of books and records of Security Building and Loan Association, Arizona Holding Corporation and Century Investment Trust, which was raised by objection to testimony (R. 658, 695).

10. Admitting in evidence a pamphlet relating to Century Investment Trust bearing fac-simile signature of defendant Jesse H. Shreve, which was raised by objection to the evidence (R. 723).

11. Admitting in evidence a mortgage executed by Wm. H. Perry to Yavapai County Savings Bank, which was raised by objection to the evidence (R. 547).

12. Admitting in evidence sheriff's deed executed to Yavapai County Savings Bank, which was raised by objection to the evidence (R. 551).

13. Admitting testimony of Government's witness Fierstone based upon his summary of books of Century Investment Trust relating to transactions after October 24, 1931, which was raised by objection to the evidence (R. 703, 704).

14. Refusing to permit defendants' witness Crane, a certified public accountant, to testify with regard to accepted accounting principles, raised by objection by counsel for the Government (R. 834).

15. Permitting Government's witness York to testify to communications with his daughter, which was raised by objections to the evidence (R. 560, 561).

16. The charge of the trial court with respect to proof of withdrawal of defendants from the

schemes alleged, which was raised by exception to the charge (R. 896).

17. Refusal of the trial court to charge the jury to disregard representations alleged in the indictment with regard to paid-in capital stock, which was raised by defendant's requested instructions (R. 898).

18. Insufficiency of the evidence to show that defendants mailed, or participated in the mailing, of the indictment letters, which was raised by motion for directed verdict (R. 101, 730, 849).

SPECIFICATION OF ASSIGNED ERRORS

Appellants rely upon the following Assignments of Error:

I (R. 904).

II (R. 905).

III-IV-V-VI-VII (R. 905 to 915).

VIII-IX-X-XI-XII (R. 915 to 920).

XIII-XIV-XV-XVI (R. 922 to 926).

XVIII-XIX-XX (R. 928 to 932).

XXI-XXII (R. 938, 939, 940).

XXIII (R. 941).

XXIV (R. 942).

XXV R. 943).

XXVI-XXVII-XXVIII-XXIX (R. 946 to 950).

XXXII-XXXIII-XXXIV-XXXV (R. 953 to 955).

ARGUMENT OF THE CASE

FIRST: THE TRIAL COURT ERRED IN OVERRULING DEFENDANTS' SPECIAL DEMURRER WHICH ATTACK THE INDICTMENT FOR DUPLICITY. THE ALLEGED FRAUDULENT SCHEMES ARE PLEADED IN COUNTS ONE AND FOUR OF THE INDICTMENT. BY THE LANGUAGE EMPLOYED IN COUNT ONE OF THE INDICTMENT, THE SCHEMES THERE PLEADED ARE INTERWOVEN WITH THE SCHEMES PLEADED IN COUNT FOUR. IN THIS WISE THE SEVERAL COUNTS OF THE INDICTMENT ARE JOINED.

ASSIGNMENT OF ERROR

I

The Court erred in overruling the special demurrer of defendants to the indictment, for the reason the indictment is duplicitous in that the fraudulent schemes, as alleged in counts one and four of the indictment, are interwoven, and the several counts of the indictment are joined, to which rulings defendants excepted (R. 904).

Defendants' special demurrer attacked the indictment on the ground, among others, that it is duplicitous (R. 39, 40 (d) (c)). The special demurrer was overruled, and defendants excepted (R. 101, 181).[6]

The indictment as it appears after the dismissal of the conspiracy charge (R. 182) is divided into two separate presentments. The first, comprising the first three counts, sets forth schemes and artifices for obtaining money by means of false pretenses, representations and promises in their relation to the Security Building and Loan Association (R. 1 to 14). The second, comprising counts 4, 5, 6, 7, 8, 9, 10 and 11, sets forth different schemes and artifices for obtaining money by means of false pretenses, representations and promises in their relation to the Arizona Holding Corporation and the Century Investment Trust (R. 14 to 38).

The following allegations appear in the second paragraph (count one) of the indictment:

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6. On the former appeal of the case, this court said the sufficiency of the indictment to charge an offense was not challenged. Shreve vs. U. S., 77 Fed. (2nd) 2, 4. The indictment was then challenged by special demurrer (Record on former appeal, No. 7460 p. 98-e), assigned as error (Record on former appeal, id 675 (5) and briefed (Brief of Shreves and Evans, id p. 129). The lower court, after the reversal by this Court, again considered the special demurrers an doverruled them (R. 101, 181).

"That prior to the dates on which the several letters, statements and writings *hereinafter referred to* were placed and caused to be placed in the United States Post Office, *as hereinafter* in the *several counts* of this indictment alleged * * *" (R. 2).[7]

And towards the end of the third paragraph (count one) of the indictment it is alleged as follows:

"the defendants would make and cause to be made the pretenses, representations and promises *hereinafter set forth* * * *"[8] (R. 3).

Thus, the first artifices and schemes run through the whole indictment, although the first three letters are pleaded in execution of the first artifices and schemes only (count one) and the next eight letters are pleaded in execution of the second artifices and schemes only (count two). In this method, therefore, the artifices and schemes are interwoven, although separated by numerical division only.

An indictment in several counts is a collection of separate bills, and every separate count should charge a defendant as if he had committed a separate offense. *De Jianne vs. U. S.*, (CCA3) 282 Fed. 737, 742; 31 C. J. 742. Counts may refer to each other for the purpose of supplying allegations common to all (31 C. J. 744) but here we have a comingling of offenses since different schemes and artifices, involving different corporations, are separated by numerical division only.

It may be contended that the intention of the pleader to separate the artifices and schemes in the indictment appears by implication or intendment,

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7. The correct recital should be 'as hereinafter referred to in this and the next two counts of this indictment".

8. The correct recital should be "hereinafter set forth in this count of this indictment".

but that is not enough, because the indictment charges crime, and therefore must necessarily state the crime with certainty and particularity. Nothing can be left to implication or intendment. 31 C. J. 659, 660.[9]

Giving, therefore, a meaning to words and phrases which will not distort them, the indictment is duplicitous and therefore bad. *Creel vs. U. S.* (CCA8) 21 Fed. (2nd) 690.

SECOND: THE BILL OF PARTICULARS ORDERED BY THIS COURT IN ITS OPINION REVERSING THE JUDGMENT ON THE FORMER APPEAL, DOES NOT COMPLY WITH THE OPINION, NOR WITH DEFENDANTS' DEMAND FOR A BILL OF PARTICULARS AS ALLOWED BY THE TRIAL COURT... THE BILL IS EVASIVE, INDEFINITE, AND INCOMPLETE, AND IT DOES NOT FAIRLY ADVISE DEFENDANTS OF THE EVIDENCE THEY WERE REQUIRED TO MEET. THE TRIAL COURT THEREFORE ERRED IN OVERRULING DEFENDANTS' OBJECTION TO THE BILL, AND IN DENYING DEFENDANTS' MOTION TO SUPPLEMENT IT.

ASSIGNMENT OF ERROR

II

The Court erred in overruling defendants' objections to the bill of particulars filed by the Government, and denying defendants' motion to supplement said bill of particulars, because (a) it is evasive, indefinite, uncertain and incomplete; (b) because the bill refers defendants to the transcript of testimony, and exhibits received in evidence, at the former trial of the cause; and (c) because the bill does not advise the Court or defendants of the evidence defendants were required to meet, to which rulings defendants excepted (R. 905).

In reversing this case on the former appeal this

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9. On the former appeal, counsel for the Government met this argument by saying that "any person of ordinary intelligence" will readily see what these allegations mean (appellee's brief in No. 7460, p. 25). Assuming that is true, it is the very thing the law condemns.

Court, contrary to the ruling of the lower court, held that the defendants were entitled to a bill of particulars before the retrial of the case. *Shreve vs. U. S.* 77 Fed. (2nd) 2, 9. The defendants filed a supplemental motion and demand for a bill of particulars and the trial court granted it (R. 60). The United States Attorney filed the bill (R. 60) and defendants objected to the sufficiency of it, and moved that it be supplemented (R. 85, 87). This objection was overruled by the trial court, and defendants excepted (R. 101, 181).

The motion to supplement the bill pointed out in detail wherein it failed to meet the demand for it. The bill, as filed, discloses that it left much to conjecture. For illustration, in answer to question 9 of the demand, the bill refers defendants to exhibit No. 314 introduced at the former trial (R. 68). In answer to questions 14 (R. 72) 16 (R. 74) 17 (R. 75) 18 (R. 76) and 20 (R. 78) the bill refers defendants to exhibits 110 to 118, inclusive, introduced at the former trial. The bill is typified by the following:

> "This question (question 16 of the demand) is answered by the books and records of the Century Trust introduced at the former trial, exhibits numbers 110 to 118 inclusive, and as amplified by the testimony of the witness C. K. Fierstone at the former trial." (R. 74).

The United States Attorney, apparently realizing the insufficiency of the bill, closes it with this nebulous statement:

> "And, as a further answer to all of the questions asked in the defendants' request for a bill of particulars, the Government states that all of the matters requested and not here specifically answered may be found in the transcript of the testimony at the former trial, all of which was

testified to in the presence of the defendants and their attorneys." (R. 81).

The solving of the ramifications of this case, as aptly stated by this Court on the former appeal, was still imposed upon defendants by the bill as filed.

The office of a bill of particulars is clear. It is stated by this court in *Kettenbach vs. U. S.*, 202 Fed. 377, 383, quoting with approval from *U. S. vs Adams Express Company*, 119 Fed. 240, as follows:

> "The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts more or less in detail, he will be required to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars."

That decision is not compiled with as the bill stands. On the contrary, defendants were required to delve into exhibits, books and records, and into an unofficial transcript of testimony, to conjecture as to the evidence which would be produced against them. Besides, as we shall show under subsequent Assignments of Error, and particularly by the next Assignment of Error, the trial court did not limit the Government's evidence to the facts set forth in the bill of particulars.

THIRD: THE TRIAL COURT ERRED IN PERMITTING GOVERNMENT'S WITNESS FIERSTONE TO TESTIFY THAT STOCK OF SECURITY BUILDING AND LOAN ASSOCIATION HELD BY CENTURY INVESTMENT TRUST VALUED AT $99,457.50 WAS CHARGED OFF AS A LOSS ON DECEMBER 16, 1931, BECAUSE THAT IS A TRANSACTION WHICH OCCURRED AFTER THE LAST DATE OF ANY INDICTMENT LETTER OR PRINTED MATTER, AND BECAUSE IT OCCURRED SUBSEQUENT TO THE DATE ANY SCHEME WAS EXECUTED AS FIXED BY THE BILL OF PARTICULARS.

ASSIGNMENT OF ERROR

XXIV

The Court erred in permitting Government's wit-

ness Fierstone to testify, as an auditor for the Government, relative to transactions which occurred after October 24th, 1931, over the following objection and exception by counsel for defendants:

(The witness testified on direct examination): "There is also a charge against the accounts receivable to the Arizona Holding Corporation of $11,586.07, and on December 16th, 1931—

MR. HARDY: We object to any testimony, your Honor, after October 24th, 1931, because testimony after that date is not within the confines of the Bill of Particulars or the indictment.

THE COURT: Go ahead.

MR. HARDY: Exception.

THE WITNESS: On December 16th, 1931, the stock of the Guardian Western Company, then being valued at $845,000.00, was sold along with the other assets of the company to the Arizona Holding Corporation, this stock being sold for 231,145.05.

The witness continuing: That $231,146.05 was the purchase of this Guardian Western stock. Well, at that time the assets of Century Investment Trust were sold to the Arizona Holding Corporation and the liabilities were transferred, and the Century Investment Trust received a note from the Arizona Holding Corporation for the difference between the two, amounting to $250,000.00. The books do not record anywhere the payment of the note of the Arizona Holding Corporation to the Century Investment Trust. I believe that is still an asset of the company.

MR. FLYNN: Now, can you tell from the books, Mr. Fierstone, what became of the stock

of the Building & Loan Association which was held by the Century Investment Trust?

THE WITNESS: On December 16th, 1931, it was being carried at a valuation of—

MR. HARDY: Now, we make that same objection, your Honor. It is a transaction which occurred after the last date in the Bill of Particulars.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: On December 16th, 1931, it was being carried at a valuation of $99,457.50 and on that date it was charged off as a loss." (R. 942).

Government's witness Fierstone was an auditor employed in the Division of Investigation of the Federal Government (R. 688). He audited the books of Century Investment Trust and testified from this audit as a witness for the Government (R. 689). His testimony quoted in the foregoing Assignment of Error discloses that stock of Guardian Western Company, valued at $845,000, was sold on December 16, 1931, with other assets of that company, to Arizona Holding Corporation for $231,145.05 (R. 703). Guardian Western Company is not mentioned in the indictment, nor in the bill of particulars. The witness further testified that the assets of Century Investment Trust were sold, and its liabilities transferred, to Arizona Holding Corporation, and Century Investment Trust received a note from Arizona Holding Corporation for the difference amounting to $250,000 (R. 704). Thereupon counsel for the Government inquired from the witness as to what became of the stock of Security Building and Loan Association which was held by Century Investment Trust, to

which defendants objected because the question involved a loss transaction which occurred after October 24, 1931, which is the last date of any indictment letter, or scheme fixed by the bill of particulars (R. 703, 704). However, the witness was permitted to answer that the stock of Security Building and Loan Association, held by Century Investment Trust, was carried at a value of $99,457.50, and, on December 16, 1931, was charged off as a loss (R. 704).

This testimony with respect to this large item of loss, involving as it does the three corporations named in the indictment, went, therefore, to prove the insolvency of those corporations as alleged in the indictment (R. 4, 16). The bill of particulars fixed the devising of the schemes between May 1928, and October 24, 1931 (R. 61). October 24, 1931, is the latest date of any indictment letter (R. 11) and the trial court so charged the jury (R. 876). The testimony went beyond October 24, 1931, and thus, in the language of this court in *Kettenbach vs. U. S.*, supra, the trial court did not "limit the Government in its evidence to those facts set forth in the bill of particulars". Defendants were not advised that they would be required to meet testimony of this character, and obviously, in view of the limitation of the last date of the schemes fixed in the bill, the receipt of it placed defendants at a prejudicial disadvantage.[10]

Hass vs. U. S., (CCA8) 93 Fed. (2nd) 427, 435, 436.

It is true the trial court charged the jury that evidence relating to transactions subsequent to Oc-

10. Other pertinent testimony of transactions occurring after October 24, 1931, are found in the testimony of Government's witness Watt (R. 261, 608), Hammons (R. 524), and Fierstone (R. 705)... In order not to offend against the admonition of this court with respect to numerous assignments of error, no error is assigned upon the testimony of these witnesses, but reference is made to it for the purpose of enlarging the error which is assigned.

tober 24, 1931, could only be considered for the purpose of determining intent (R. 876) but defendants nevertheless were entitled to be advised as to what evidence the Government would offer to prove intent. *Kettenbach vs. U. S.*, supra.

FOURTH: THE WITNESSES HOBBS AND PERKINS TESTIFIED ON BEHALF OF THE GOVERNMENT CONCERNING CONVERSATIONS WITH DEFENDANTS JESSE H. SHREVE AND ARCHIE C. SHREVE. THE TRIAL COURT ERRONEOUSLY REFUSED TO PERMIT DEFENDANT ARCHIE C. SHREVE TO GIVE HIS VERSION OF THESE CONVERSATIONS, OR TO PERMIT DEFENDANTS TO MAKE OFFER OF PROOF IN RESPECT THERETO.

ASSIGNMENTS OF ERROR

III

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf, and on behalf of defendant, Jesse H. Shreve, concerning a conversation between Government's witness Glen O. Perkins, said defendant Jesse H. Shreve, and himself, about which said Government's witness Perkins had previously testified. The grounds urged for the objection, and the exception taken, and the full substance of the testimony rejected, are as follows:

> The witness Archie C. Shreve testified on direct examination: "At or about the time the Century Investment Trust and the Security Building and Loan Association opened offices in Phoenix, I had a conversation with regard to the future business of those corporations at the office of the Security Building and Loan Association and the Century Investment Trust, in the Adams Hotel Building, here in Phoenix. My brother J. H. Shreve, Glen O. Perkins and myself were present at that conversation. To the best of my recollection, it was said at that meeting that the companies had opened for business, including the

Building and Loan Association at Phoenix, and things were not going so well. It was soon after the so-called great crash in 1929 and my brother J. H. Shreve came over to Phoenix from San Diego and stated that—

MR. FLYNN: Just a minute. At this time, your Honor, we object to the conversation between the defendants, for the reason that it is inadmissable. It is self-serving conversation between the defendants in this case.

THE COURT: Yes, purely self-serving.

THE COURT: If you want to get in a statement in the record that Perkins made, that is different. Conversations between these people are purely self-serving.

MR. HARDY: Not as between persons who had a conversation at which the witness Perkins was present, your Honor.

THE COURT: I say, if you want to get into the record Perkins' testimony—

MR. HARDY: Associate him with the companies. All right. Q. What was said to Mr. Perkins at that time?

MR. FLYNN: Object to that, no foundation is laid for it; no impeaching question was asked Mr. Perkins about any such conversation when he was on the stand.

THE COURT: I don't recall.

MR. HARDY: Certainly, Mr. Perkins testified about a conversation which he had with both Archie Shreve and J. H. Shreve.

THE COURT: All right, you have your conversation.

MR. HARDY: For the purpose of the record, may we have an exception, and I will try

to ask another question.

THE COURT: Yes, indeed.

MR. HARDY: Q. Now, you have stated that about this time there was a conference between Glen O. Perkins, J. H. Shreve and yourself?

A. There was.

Q. At Phoenix, Arizona?

A. Yes, sir.

Q. Was this conversation directed to Mr. Perkins, or did it, in any way, involve him with respect to a connection with either the Century Investment Trust or the Security Building and Loan Association?

A. It did, and about the conduct of this business.

Q. Now, state it.

MR. FLYNN: Object to it on the ground it is self-serving.

THE COURT: You are right back where you started from.

MR. HARDY: Your Honor ruled that the question may not be answered?

THE COURT: I ruled that it is purely self-serving.

MR. HARDY: Exception.

(The witness continuing): Mr. Perkins at that time had a conversation with me, or J. H. Shreve in my presence.

Q. What was that conversation?

MR. FLYNN: We object on the ground there is no foundation laid for any impeaching statement as to Mr. Perkins' statement, no impeaching question having been asked him at the time he was on the stand, and it is self-serving.

MR. HARDY: It is not laid for the purpose impeachment. The question was asked and predicated in regard to future business of the Century Investment Trust and the Arizona Holding Corporation. It is not asked for the purpose of impeaching—

MR. FLYNN: Well, it would be immaterial.

THE COURT: Well, it would only be self-serving.

MR. HARDY: The conversation Mr. Perkins had with either of these defendants?

THE COURT: Well, if you want to impeach the witness, you have to lay the foundation for it always.

MR. HARDY: I understand that.

THE COURT: Well, I am not going to argue with you.

MR. HARDY: Exception." (R. 905).

IV

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf, and on behalf of defendant, Jesse H. Shreve, concerning a conversation between Government's witness Glen O. Perkins and John C. Hobbs, and said defendant Jesse H. Shreve, and himself, about which said Government's witnesses Glen O. Perkins and John C. Hobbs had previously testified. The grounds urged for the objection, and the exception taken, and the full substance of the testimony rejected, are as follows:

The witness Archie C. Shreve testified on direct examination: "I heard John C. Hobbs, who was a witness for the Government, testify on the occasion when he and Mr. Perkins came to San Diego in the summer or fall of 1931, and had a

conference with me and J. H. Shreve with reference to the affairs of the Security Building and Loan Association. I believe Mr. Perkins and my brother Daniel H. Shreve telephoned me and asked for J. H. Shreve or myself to come to Phoenix. I told them it was not possible for us to come here any they wanted to hold a conference with us and were attempting to borrow some funds for the Building and Loan Association. As to who was to make the loan I could not say. Mr. Perkins and Dan Shreve were the people asking for a loan on behalf of the Security Building and Loan Association or the Century Investment Trust. Mr. Perkins and Mr. Hobbs came to San Diego at their request.

Q. And what was said or done after they arrived in San Diego?

A. Mr. Perkins and Mr. Hobbs and myself, my brother J. H. Shreve—

MR. FLYNN: We object to any conversation at this conference, on the ground that no proper foundation has been laid, and neither Mr. Hobbs nor Mr. Perkins, when they were on the stand, no impeaching questions were asked, and the further ground it is self-serving.

THE COURT: Sustained.

MR. HARDY: Well, at this time Mr. Hobbs and Mr. Perkins came to San Diego, California, was there any discussion with respect to the business of either the Security Building and Loan Association, the Century Investment Trust or the Arizona Holding Corporation?

A. There was a discussion of the business of the Security Building and Loan Association, and the other companies may have been mentioned.

Q. And what was the nature of that discussion?

MR. FLYNN: We object to that on the ground it is immaterial, it is self-serving, and no foundation being laid for any impeaching question.

THE COURT: Yes, the same question.

MR. HARDY: Exception.

Q. Did you at any time, while these corporations, the Arizona Holding Corporation and the Security Building and Loan Association and the Arizona Holding Corporation were functioning, have any discussion with Mr. Perkins or Mr. Hobbs about the overhead expenses of those companies?

A. I did.

Q. Will you state please what that conversation was?

MR. FLYNN: I object to that on the ground that no time is fixed, that it is self-selving; no foundation being laid for an impeaching question.

THE COURT: Sustained.

MR. HARDY: Exception." (R.909).

V

The Court erred in refusing to permit the defendants to make an offer of proof with regard to the excluded testimony concerning the conversations between the defendants and the said Glen O. Perkins and John C. Hobbs, referred to in Assignments of Error III and IV. The error assigned is manifested by the following proceedings:

"MR. HARDY: May it please your Honor, in reference to the three questions which were asked of this witness pertaining to the conversa-

tion on December 20th, and the conversation early in the year 1930. and a conversation in February, 1930, between this defendant and the defendants J. H. Shreve and Glen O. Perkins, and J. C. Hobbs, which, upon objection by the United States Attorney, were held inadmissible, and which objection was sustained, may we have the privilege at this time, for the purpose of the record only, of making an offer of proof in regard to those questions?

THE COURT: No.

MR. HARDY: May we file with the Clerk of the Court a written offer?

THE COURT: You can do that if you want to, but you can't get it before the jury.

MR. HARDY: Can we make it without the presence of the jury?

THE COURT: No, you may write it out.

MR. HARDY: And may it be considered as a part of the evidence?

THE COURT: It would not be a part of the evidence because it is not admitted.

MR. HARDY: As part of the record in this case?

THE COURT: You can file it with the Clerk.

MR. HARDY: Then, may we have an exception to the refusal to be permitted to make the offer?

THE COURT: Yes." (R. 911).

VI

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf, and on behalf of his co-defendant Jesse H. Shreve, concerning a conversation between Government's wit-

ness Glen O. Perkins, said defendant Jesse H. Shreve, and himself, with regard to Government's Exhibit 207, about which said Government's witness Glen O. Perkins had previously testified. The grounds urged for the objection, and the exception taken, and the full substance of the testimony rejected, are as follows:

"Q (By Mr. Hardy: Now, Mr. Shreve, I hand you Government's Exhibit No. 207, which is a pamphlet or a circular of the Century Investment Trust, and which was identified by Mr. Perkins, the witness for the Government in this case. Did you ever have any conversation with Glen O. Perkins with respect to that circular?

A. I have.

Q. State what the conversation was.

MR. FLYNN: Object to it on the ground the time and place and those present has not been fixed.

MR. HARDY: Q. Well, can you fix the time and place and who was present at the time you had this conversation with Mr. Perkins?

A. Early in 1930, January or February.

Q. Where?

A. At the office of the Century Investment Trust, Adams Hotel Building, Phoenix, Arizona.

Q. Who was present?

A. Myself and J. H. Shreve.

Q. Who else?

A. No one else.

Q. Was Mr. Perkins present?

A. I said Mr. Perkins, myself and J. H. Shreve.

Q. What was the conversation with Mr. Perkins in respect to that circular?

MR. FLYNN: We object to it on the ground it is hearsay, self-serving, and no foundation has been laid for any impeaching question.

THE COURT: Probably is self-serving.

MR. HARDY: Very well, your Honor. May we have an exception and may we also ask to make an offer of proof by filing it with the Clerk in connection with this Exhibit No. 207?

THE COURT: Very well.

MR. HARDY: And that the offer of proof is denied, and we may have an exception to the denial." (R. 913).

XXXV

The Court erred in refusing to permit defendant Archie C. Shreve to testify on his own behalf and on behalf of defendant Jesse H. Shreve, concerning a conversation between Government's witness Glen O. Perkins, said defendant Jesse H. Shreve, and himself, about which said Government's witness Perkins had previously testified. The grounds urged for the objection, and exception taken, and the full substance of the testimony rejected, are as follows:

The witness Archie C. Shreve testified on direct examination: "Mr. Perkins had a conversation with Dan Shreve and J. H. Shreve and myself in San Diego in connection with this matter in February, 1930.

Q. And how did that arise and what was done in that conference?

MR. FLYNN: We object to that on the ground, first, the question is a double question, and, second, as far as the last part is concerned, it is immaterial, and calling for a conversation that would be self-serving.

Q. Well, what was done with respect to your

connection with these companies at that conference?

A. Daniel H. Shreve, and when I refer to Dan, I mean Daniel H. Shreve all the time, had made two trips to Phoenix, and with the idea of taking—

MR. FLYNN: Just a minute, may I ask the witness a question?

MR. HARDY: Well, I don't think it is proper.

MR. FLYNN: I want to know whether he is answering your question or one he thought up himself. He asked what was done. You are talking about Dan Shreve, so it is—

THE COURT: I don't know what he is talking about.

MR. FLYNN: I want to know what Dan Shreve did before or after this happened. The question was directed to what happened after.

THE WITNESS: I want to tell you what happened at the conversation with Dan Shreve, Mr. Perkins and J. H. Shreve and myself, when we met in San Diego, California.

MR. HARDY: State that.

MR. FLYNN: State the conversation? We object to the conversation.

THE COURT: Why, it is not admissable, and I don't want any more of it. You are just wasting the Court's time by those tactics." (R. 955).

VII

The Court erred in refusing to permit defendants to make an offer of proof concerning the conversations between the defendant Archie C. Shreve and the said Glen O. Perkins, referred to in Assign-

ment of Error VI, and for the reasons set forth in that Assignment of Error (R. 914).

At the threshold of defendants' case, the trial court refused to permit defendant Archie C. Shreve to testify to conversations about which Government's witnesses Perkins and Hobbs had previously testified (R. 760, 761, 765, 768, 769, 770, 771, 778, 779, 797). Perkins organized Arizona Holding Corporation for the purpose of raising funds to organize Security Building and Loan Association (R. 630). The organization was not a plan of defendants, nor did they become associated with it until Perkins and Hobbs met difficulties, and then only at their solicitation (R. 633, 634). Perkins was indicted for the same offenses for which these defendants stand convicted, and he was convicted of some of them on the former trial (R. 180). Since that conviction he was granted a severance, and became a witness for the Government against defendants on this retrial of the case (R. 181). Hobbs joined Perkins in promoting Arizona Holding Corporation, and remained with that company, as well as Security Building and Loan Association, and Century Investment Trust, as did Perkins, until they failed. Perkins and Hobbs were so intimately associated with these companies, that conversations between them and defendants concerning matters of policy were as important to defendants as they were to the Government.[11] Perkins as a witness for the Government, testified as follows:

> "I had a conversation with Jesse Shreve when he was here just before the companies *closed.* That is the time Jesse Shreve told me he had made

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11. Both were officers of the corporations named in the indictment. They signed indictment letters as such officers (R. 8, 19, 23, 27, 28, 30).

an arrangement with Louis B. Whitney, an attorney in Phoenix, and Neri Osborne, Jr., a resident of Phoenix, to place these corporations in receivership and appoint Neri Osborne receiver. *He* spoke of liquidating the companies at a prior date. At the time of these conversations with Jesse Shreve in regard to these liquidations, *Archie Shreve was present.* That was before the conversation with Jesse H. Shreve in San Francisco. *Archie* was present the first time he spoke about liquidating the companies. That was in his home in San Diego. *Archie Shreve, Jesse H. Shreve and myself were present.* I think it was early in November of the year the building and loan closed. The building and loan closed in 1931. Mr. Whitney and Mr. Osborne were not discussed in the conversation in San Diego in which *Jesse Shreve, Archie Shreve, John Hobbs and myself were present in Jesse Shreve's home.* This conversation in San Diego *was prior* to the reference to these gentlemen." (R. 641, 642).[12]

Hobbs, as a witness for the Government, testified as follows:

"Before the building and loan association closed, I made a trip to San Diego by airplane. I think it was about a month before the building and loan association closed. *Glen Perkins was with me. J. H. Shreve and A. C. Shreve met me.* I had a conversation with *them* at that time which was to the effect that business conditions all over the country were poor, that we had over here a number of requests for withdrawals, and in view of the situation *as a whole*, it was perhaps best to *liquidate* the building and loan. I am

12. The wtness Perkins also detailed other conversations relating to defendants (R. 641, 642, 643, 645).

not certain that I was requested to sign anything at that time. Some time I was requested *to sign a schedule in bankruptcy.* I think that was shortly before the time the building and loan association closed. We had requests for withdrawals and in all cases were not able to fill the requests. *We didn't have the money.* I can't fix the time definitely in my mind but I know I was asked *to sign a schedule* about the time that the building and loan association went into bankruptcy."

Question by Mr. Peterson, counsel for the Government: "Can you recall who requested you?"

The witness: "I am not certain. It was either *J. H. Shreve* or Dan. It might has been *Archie.* I don't know. *I did not sign the bankruptcy schedule.*" (R. 389 to 392).

1. Defendants' version of these conversations was not immaterial, self-serving, or impeaching, which were the only grounds of objection interposed by Government counsel. The conversations were opened by the Government and defendants were then entitled to give the whole of their version of it.

Testimony of Perkins and Hobbs with regard to these conversations was important, because it referred to the indictment allegations of insolvency of the corporations named in the indictment, and also to defendants' connection with these corporations.[13] Hobbs testified he was requested by one of the defendants, or Daniel H. Shreve (a deceased defendant) to sign a bankruptcy schedule, and refused (R. 390 to 392). This inference was as damaging as it was significant. The whole of the excluded testimony was no less important, because it dealt with

13. Counts one and four of the indictment allege schemes and artifices to defraud, which are wholly predicted upon insolvency of the corporations named in the indictment (R. 1, 14).

matters about which Government witnesses Perkins and Hobbs had previously testified, as we have shown above. The conversations sought to associate defendants with the management of these corporations up to the time they failed. The defendant Archie C. Shreve would have disavowed such association had he been permitted to testify (R. 792, 793). Hobbs had already substantiated this profered disavowal by showing that after Daniel H. Shreve came to Phoenix in the spring of 1929 or 1930, he took charge of the business (R. 403, 404). The defendants both lived in San Diego and were engaged in business there. It is significant and important in this connection that neither defendant signed any indictment letter.

The repeated objections by counsel for the Government that this excluded testimony was immaterial, self-serving, and would impeach the witnesses Perkins and Hobbs are without support in law.[14]

> "The self-serving acts and declarations of accused are not admissable in his behalf, unless they are part of the res gestae, or unless they were done or made in a conversation part of which has already been introduced in evidence by the state." 16 C. J. Sec. 1265 (p. 636) referring to Sec. 1111 (p. 571) which is as follows:
>
> "Evidence is sometimes admitted, or its admission is held not error, on the ground that similar evidence has been introduced, or proof of the same character has been made, by the adverse party. This is but common fairness. * * * It is well settled that, where either the state or accused introduces part of a conversation, trans-

14. Instances of these objections, and the trial court's rulings sustaining the objections, are found at the following pages of the record: (R. 761, 762, 763, 764, 768, 769, 770, 778, 779, 797).

action, or writing, the opposing party is entitled to introduce other parts or the whole of the conversation, transaction, or writing, and it is sometimes so provided by code or by statute. Limitations to the rule are that the evidence offered must relate to the same subject matter, and must explain and be necessary to a full understanding of that already introduced." C. J. Sec. 1111 (p. 571).

The text above quoted cites in support *Carver vs. U. S.*, 164 U. S. 694, 17 Sup. Ct. 228, 41 L.Ed. 602. There the Supreme Court reversed a judgment of conviction because the defendant was denied the opportunity to prove his version of a conversation which had been introduced against him. The Supreme Court says:

"The sixth assignment of error was taken to the refusal of the court to permit the defendant to prove by Mary Belstead and Mary Murray the declarations of defendant, and what he said to deceased, and what she said to him, at the place of the fatal shot, immediately after the shot was fired, for the reason that the same was part of the res gestae, and was also a part of the conversation given in evidence by the government witnesses. We fail to understand the theory upon which this testimony was excluded. Hays and Brann, two witnesses for the government, had testified that they had heard the shots fired and the scream of a woman; that Brann started for the place, and met defendant running away; that defendant went back towards the woman, and then returned again, when Brann caught him and took him back to the woman, about 30 yards. About this time Hays came up, and and both testified as to the conversation or exclamations

that were made, between deceased and the defendant. Defendant's two witnesses, Belstead and Murray, appear to have come up about the same time, and, whether the conversations that took place between defendant and deceased at that time was part of the res gestae or not, it is evident that it was practically the same conversation to which the government's witnesses had testified. If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that defendant was not prejudiced by the conversation as actually proved; but where *the whole or a part of a conversation* has been put in evidence by one party, the other party is entitled to *explain, vary, or contradict it.*"[15] (Italics supplied).

See: Nichols Applied Evidence, Vol. 5 pps. 4762 to 4767.

Thus, even where a statute limits the quantity of proof, testimony concerning a conversation excluded by the statute having been introduced by one party, warrants the adversary party to give his version of it. It is so decided by the Supreme Court in *Bogk vs. Gassert*, 149 U. S. 17, 24, 13 Sup. Ct. 738, 37 L.Ed. 631, where it is stated:

"In rebuttal, Steele and Gassert were put upon the stand and asked as to the conversation which took place at the attorney's office at the time the deeds and contract to reconvey were

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15. In the case quoted from the testimony excluded was offered by witnesses for defendant and not by the defendant himself. The situation is srengthened here because a defendant himself offered to give the excluded testimony. He should have been permitted to give the testimony not only on his own behalf but also on behalf of his co-defendant.

made. The conversation was admitted, and defendant excepted. Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction, gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiff's having taken advantage of the license thereby given to submit to the jury their understanding of the agreement. The Code is merely in affirmance of the common-law rule, and was evidently not intended to apply to a case of this kind."

Stevenson vs. U. S. (CCA5) 86 Fed. 106, 110, applies the rule and cites *Carver vs. U. S.*, Supra, in approval.

The objection by Government counsel that the rejected testimony was immaterial is refuted by the foregoing authorities. The objection that it would be impeaching has no support, because, rather, it was defendants' version of something already testified against them, so that objection is also refuted by the foregoing authorities. It is not self-serving under the foregoing authorities, and because the contrary has been decided by this Court.

Perrin vs. U. S. (CCA9) 169 Fed. 17, 24.

In accord are:

Nichols Applied Evidence, Vol. 5 p. 4763, 16 C. J. Sec. 1263 (p. 634).

Hinton vs .Welch, 179 Cal. 463, 177 Pac. 282.

Carstensen vs. Ballantyne, 40 Utah 407, 122 Pac. 82, 85.

2. The trial court erred in refusing defendants to make an offer of proof of this rejected testimony.

The trial court refused to permit defendants to make an offer of proof of their version of these conversations (Assignments of Error V and VII, supra). We submit it was unprecedented for the court to deny this offer of proof.[16] The court suggested the offer could not be made before the jury. Counsel for defendants requested that the jury be excused, which was denied (R. 790). The court became impatient with persistence and rebuked counsel for defendants.[17] Counsel for defendants persisted only because he thought his position was right.[18]

In view of the court's rulings, these offers of proof, as we have shown, were filed with the Clerk and probably are a part of the record on appeal by permission only. Since the trial court refused *to entertain* the offers, none was before him.

The error pointed out by the foregoing Assignments is plain. The effect is manifestly unfair and highly prejudicial, alone justifying, as we believe, a reversal of the judgments.

3. Refusal to permit defendant Archie C. Shreve to testify with regard to Government's Exhibit 207 concerning a conversation with Government's witness Perkins, was error.

Government's Exhibit 207 (Assignment of Error VI, Supra) was identified by Government's witness Perkins who testified that the *facsimile* signa-

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16. The offer of proof was filed with the Clerk (R. 790, 797). It is set forth in the Appendix (pp. 1 to 5), and appears at pages 790 to 794 and 797, 798 of the Record.

17. For instance, the learned trial judge said to defendants' counsel: "Well, I am not going to argue with you." (R. 763). Again: "Why, it is not admissable, and I don't want any more of it. You are just wasting the Court's time by those tactics." (R. 771). Upon reflection it must now appear that counsel was only attempting to inform rather than provoke the court. Respect for the Court naturally suppressed counsel.

18. Rule 43 (c) of Civil Procedure of District Courts (effective Sept. 1, 1938) adopted by the Supreme Court pursuant to Act of June 19, 1934, requires the trial court to do what the trial court refused here (See Rule, Appendix p. 5).

ture thereon is that of defendant J. H. Shreve (R. 653). The exhibit itself discloses that it is the *facsimile* signature of J. H. Shreve (R. 724, 727). Since Perkins gave testimony concerning the exhibit, by identifying it, then "the bars were down" for the defendants "to take advantage of the license thereby given to submit to the jury" (*Bogk vs. Gassert*, supra) their version of the circumstances connected with the preparation and distribution of this exhibit.

In convenient order, the next Assignment of Error XXV should be considered for the purpose of analyzing the foregoing Assignment of Error VI.

ASSIGNMENT OF ERROR XXV

Under sub (d) of Rule 24, this Assignment of Error is copied in full in the Appendix at page 6. It is summarized as follows:

The Court erred in admitting in evidence Government's Exhibit 207, which is a circular pertaining to Century Investment Trust, bearing the facsimile signature of J. H. Shreve. There was no proof that J. H. Shreve, or his co-defendant, mailed it or caused it to be mailed. It was hearsay and incompetent. It was received in the postoffice box of Government's witness Manuel J. King. It was not addressed to the witness, but was addressed to Manuel "K." King.

The exhibit, among other recitals, recites that Century Investment Trust owns control, or has stock ownership, in certain named corporations, without differentiation. It further recites, contrary to the indictment allegations, that Century Investment Trust is a prosperous, healthy growing corporation, and invited the addressee to join the company be-

fore the very early advance in price of the stock (R. 943).

The exhibit is long, so it is paraphrased in the Assignment of Error (R. 943). It is set forth in full in the record (R. 724). It is a lulling invitation to purchase stock of Century Investment Trust. While Perkins identified the exhibit (R. 653), and Government's witness Manuel J. King testified he received it through the mails (R. 722), it is addressed to Manuel "K." King (R. 724). It is not mentioned or displayed in the indictment. Defendant Archie C. Shreve was refused the opportunity to testify that defendants disavowed the exhibit, and that it be suppressed as soon as it was discovered (R. 796, 797, 798). It bore the *facsimile* signature only of J. H. Shreve (R. 727), and thus the imprint of that signature was available to anyone who had access to his genuine signature. There is not one word of evidence in the record that either defendant was in any manner connected with the exhibit, except it bore the *facsimile* signature of J. H. Shreve. Its harmful effect is exemplified by the incident that counsel for the Government introduced it as the dramatic climax to their case in chief, during the testimony of the last witness then called (R. 722, 727).

Aside from the fact the Court erred in refusing to permit defendant Archie C. Shreve to explain it (Assignment of Error VI, supra) error also follows the admission of the exhibit in evidence at all, because the only evidence connecting defendants with the exhibit is the testimony of Perkins identifying the *facsimile* signature of J. H. Shreve (R. 653), and the testimony of King that he received the exhibit through the postoffice (R. 722).

Defendants objected to the receipt of the ex-

hibit in evidence because it was hearsay, and incompetent, predicated upon the reasons stated in the objection (R. 723). No foundation whatever was laid for the admission of the exhibit. It was error to admit it, because in the absence of proof associating defendants with it, the *facsimile* imprint of the signature of defendant J. H. Shreve upon it was not enough. In *Hartzell vs. U. S.* (CCA8) 72 Fed. (2nd) 569, 578 it is said:

> "Ordinarily, where a writing is not shown to have been *executed* by the defendant, it cannot be offered in evidence against him. To be admissible in a criminal case, either to connect the defendant with the commission of the crime, or to procure a verdict against him, a writing must be established with that degree of certainty recognized as necessary to a conviction. *Sprinkle v. United States* (CCA4) 150 F. 56. *A writing, of course, does not prove itself, and there is no presumption that a telegram is sent by the party who purports to send it. McGowan v. Armour* (CCA8) 248 F. 676; *Drexel v. True* (CCA8) 74 F. 12; *Ford v. United States* (CCA9) 10 F. (2nd) 339. The Government was therefore bound under the established rules of evidence to prove that Hartzell was the person who sent these messages. * * * *" (Italics supplied).

Bearing in mind the damaging import of the whole exhibit, the erroneous admission of it at once implies its harmful effect, and, when coupled with the refusal of the trial Court to permit defendants to explain their connection with it, leaves no room to question the prejudicial effect of the error suggested.

FIFTH: THE INDICTMENT ALLEGES THAT THE DEFENDANTS FALSELY PRETENDED AND REPRESENTED THAT ALL MONEY DEPOSITED WITH THE SECURITY BUILDING

AND LOAN ASSOCIATION WOULD BE INVESTED IN SOUND FIRST MORTGAGES ON IMPROVED REAL ESTATE CAREFULLY SELECTED, WHEREAS SUCH MORTGAGES WERE AT ALL TIMES UNCOLLECTABLE AND PRACTICALLY WORTHLESS. THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE EXEMPLIFIED COPIES OF SUCH MORTGAGES, AND ALSO EXEMPLIFIED COPIES OF DEEDS AND ASSIGNMENTS RELATED THERETO, WITHOUT FIRST REQUIRING THE GOVERNMENT TO ACCOUNT FOR THE FAILURE TO PRODUCE THE ORIGINALS, OR IN ANYWISE LAY THE FOUNDATION FOR ADMISSION OF SECONDARY EVIDENCE THEREOF.

ASSIGNMENTS OF ERROR

VIII

The Court erred in admitting in evidence Government's Exhibit 125, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: May it please your Honor, we object to the introduction of Government's Exhibit No. 125 for identification for the reason that it appears to be an exemplified copy of a warranty deed recorded in the office of the Recorder of Maricopa County, Arizona. Do I assume, Mr. Peterson, that the exemplified copy is offered under the provisions of the—

MR. PETERSON: Of the Federal Statute.

MR. HARDY: Of the Federal Statute?

MR. PETERSON: And the State.

MR. HARDY: The Code of 1928?

MR. PETERSON: And also the Federal Statute.

MR. HARDY: We object, your Honor, for the reason the Federal Statute has no application to State records, and only applies to records of the Federal Government, or the officers of the Federal Government, and for the further reason the exemplified copy is not admissible under the provisions of the Arizona Code of 1928.

It would not be admissible under the rule in the Federal Court under the statute which was existing in the Territory of Arizona at the time of the admission of the Territory into statehood on February 14th, 1912; that under the statues of the Territory then existing there is no provision for the introduction of an exemplified copy of the records of a county recorder without proof that the original record is not within the possession or control of the party offering the document, and for that reason the exhibit is not the best evidence. It is hearsay as to these defendants; that only in the absence of a showing as required by the law existing at the time of the admission of the Territory into statehood, either the original only could be introduced, or of proof that the original is not in the control or possession of the party offering it.

THE COURT: Overrule the objection.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy of Warranty Deed dated December 20, 1930, executed by Arizona Holding Corporation by D. H. Shreve, President, R. F. Watt, Secretary, to Jas. M. Shumway, conveying Lot 3 in Block 2 of Goldman's Addition to the Town of Tempe, recorded on map or plat thereof of record in the office of the County Recorder of Maricopa County, Arizona, in Book 1 of Maps at page 49 thereof; acknowledged by D. H. Shreve and R. F. Watt as President and Secretary respectively before E. F. Young, Notary Public, December 20, 1930; filed and recorded at request of Arizona Title Guaranty and Trust Company May 12, 1931, W. H. Linville, County Recorder (R. 915).

IX

The Court erred in admitting in evidence Government's Exhibit 135, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to the receipt in evidence of Government's Exhibit 135 for identification for the same reasons that we objected to the introduction of Government's Exhibit 125, and for the further reason that the exhibit has not been properly identified; no foundation has been laid for its admission.

THE COURT: Overrule the objection.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy Realty Mortgage executed December 30, 1930 by Lyda Dreyfus, mortgaging to Theo. Castle the Southeast Quarter of the Northwest Quarter of Section 3, Township 8 South, Range 18 West, Gila and Salt River Base and Meridian; Lot 3 in Section 3, Township 9 South, Range 18 West, Gila and Salt River Base and Meridian; Lot 1 in Section 5, Township 9 South, Range 18 West, Gila and Salt River Base and Meridian; all in Yuma County, Arizona; secures five promissory notes of even date calling for principal sum of $32,000, with interest at the rate of 8½% per annum, payable quarterly, $2000 due on or before one year after date, $2000 on or before two years after date, $2000 on or before three years after date, $8000 on or before four years after date, and $18,000 on or before five years after date; recorded at request of Security Title Company Jan. 5, 1931, A. K. Ketcherside, County Recorder by Lucy Frank, Dep. Rec; Assigned to Security Building and Loan Association Jan. 5, 1931, see Book 4 Assignments page 351, A. K. Ketcher-

side, Co. Rec. Released by instrument dated Nov. 4, 1931 see Book 8 Releases page 359, A. K. Ketcherside, Co. Rec. by R. P. Leatherman, Dep. Rec. (R. 917).

X

The Court erred in admitting in evidence Government's Exhibit 137, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We make the same formal objection, your Honor, to the introduction of Government's Exhibits 136 and 137 for identification, for the same reasons we made to Government's Exhibit No. 125.

THE COURT: The same ruling.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy Assignment of Mortgage executed by Theo Castle January 5, 1931, acknowledged same date before Vivian Akerberg, Notary Public, San Diego County, California, consideration $10.00; assigns to Security Building & Loan Association mortgage dated Dec. 30, 1930, executed by Lyda Dreyfus to Theo Castle, which mortgage was recorded on Jan. 5, 1931 in Book 40 of Mortgages, page___ Blotter No. 57, in the office of the County Recorder of Yuma County, Arizona; recorded at request of Security B & L Assn Jan. 15, 1931, A. K. Ketcherside, County Recorder Yuma County (R. 918).

XI

The Court erred in admitting in evidence Government's Exhibit 142, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to the receipt in

evidence of Government's Exhibit 142 for identification, for the same reasons that we objected to the introduction in evidence of Government's Exhibit 125.

THE COURT: Overruled.

MR. HARDY: And for the further reason, your Honor, it does not appear on the face of this document that it was signed at the request of either of the defendants now on trial.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy of Mortgage executed July 14, 1930, by A. E. Rayburn, a widow, mortgaging to Arizona Holding Corporation, consideration $8700.00, the West Half of Northwest Quarter of Northwest Quarter of Sec. 23, Tp. 1 N. R. 2 E. of the G. & S. R. B. & M., and acknowledged on July 21, 1930, before Roy C. Walters, Notary Public Maricopa County, Arizona; filed and recorded at request of Arizona Holding Corp. July 21, 1930, J. K. Ward, County Recorder. Notation: For release of this mortgage see Book 37 of Releases of Mortgage page 67; for assignment of this mortgage see Book 17 Assignments of Mortgages, page 115 (R. 919).

XII

The Court erred in admitting in evidence Government's Exhibit 143, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to the receipt in evidence of Government's Exhibit No. 143 for identification, for all of the reasons for which we objected to the receipt in evidence of Government's Exhibit 125, and for the additional reason,

your Honor, because it appears upon the face of an assignment of mortgage, that it was executed by the Arizona Holding Corporation by D. H. Shreve, President, and by R. F. Watt, Secretary, and acknowledged before E. F. Young, a Notary Public. There is nothing upon the face of this document which discloses that either the defendants had anything to do with it, and in addition it appears that it is executed by D. H. Shreve, as President of the Arizona Holding Corporation, whereas D. H. Shreve is now deceased, and by reason of that fact, any acts or declarations made by the defendant, D. H. Shreve, during his lifetime, are not now admissible as against these defendants; for the reason that neither of these defendants now have the opportunity to examine the said D. H. Shreve with respect to the purposes or contents of this document, nor did they have such opportunity at the previous trial of this case, for the reason that the said D. H. Shreve was alive and a defendant in that action, and not subject to cross examination by any parties to that action.

THE COURT: The objection is overruled.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Exemplified copy of Assignment of Mortgage executed July 21, 1930, by Arizona Holding Corporation by D. H. Shreve President and R. F. Watt Secy, to Security Building and Loan Association, consideration $10.00, assigning to Security Building and Loan Association mortgage bearing date July 14, 1930, executed by A. E. Rayburn to Arizona Holding Corporation, which mortgage was recorded on July 21, 1930 in Book 244 of Mortgages, records of Maricopa County, Arizona, page 58, in the office of the County

Recorder of said county; acknowledged before E. F. Young, Notary Public of Maricopa County, Arizona, on same date, by D. H. Shreve and R. F. Watt, President and Secretary; filed at request of Security Bldg. & Loan Assn. Jan. 2, 1931, W. H. Linville, County Recorder of Maricopa County (R. 920).

The foregoing Assignments of Error VIII, IX, X, XI, and XII relate to the admission in evidence of exemplified copies of deeds, mortgages, and assignments of mortgages as evidence on behalf of the Government. These assignments of error are selected as examples of similar errors.[19] The materiality of these instruments to the criminal charges is manifested by the fact that they were utilized by the Government to prove indictment allegations that defendants falsely pretended that all money deposited with Security Building and Loan Association would be invested "in sound first mortgages", whereas such mortgages "would be and were at all times uncollectible and practically worthless" (R. 5). Government's Exhibit 125 (Assignment of Error VIII, supra) and Government's Exhibit 128 (R. 475) are illustrative of the whole situation. The comprehensive objection to all these exhibits was directed to Exhibit 125 (R. 471, 472) and that objection, by reference, was made to all remaining exhibits. (footnote 19).

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19. For illustration: Mason deed (R. 482); Valentine mortgage (R. 485); Mason assignment of mortgage (R. 487); Valentine deed (R. 488); Valentine deed (R. 489); Arrington mortgage (R. 491); Dreyfus mortgage (R. 493); Castle assignment of mortgages (R. 494); Arrington deed (R. 497); Dreyfus deed (R. 502); Arizona Holding Corporation deed (R. 512); Rayburn mortgage (R. 520); Arizona Holding Corporation assignment of mortgage (R. 515); Blackburn deed (R. 517); Arizona Holding Corporation deed (R. 512); Rayburn mortgage (R. 513); Arizona Holding Corporation mortgage (R. 518); York Mortgage (R. 562); York deed (R. 565); McLaws deed (R. 566); and McLaws deed (R. 567). The admission of these instruments is not assigned as error because of the admonition against numerous assignments of error. We refer to them for the purpose of enlarging the errors assigned.

Government's Exhibit 125 is an exemplified copy of a warranty deed executed by Arizona Holding Corporation, by D. H. Shreve, President, and R. F. Watt, Secretary, and delivered to Jas. M. Shumway, conveying to Shumway property in the Town of Tempe, Arizona (R. 471 to 473). Shumway in turn mortgaged this property to Security Building and Loan Association for $11,800.00 (Exhibit 126, R. 473, 474). Shumway also delivered to Security Building and Loan Association a note for $11,800 (Exhibit 127, R. 474) which was secured by the mortgage (Exhibit 126, supra). With respect to these instruments, Shumway, as a witness for the Government, testified:

> "When I signed these instruments all these typewritten places in Government's Exhibit 127 were in blank. I signed the note in blank and when I signed Government's Exhibit 126 it was in blank. I was not present when the mortgage was acknowledged. At the time I signed Government's Exhibits 126 and 127, being a note and mortgage, I did not know that any property had been deeded to me. I am the James M. Shumway mentioned in Government's Exhibit 125. At the time I signed the note and mortgage in blank, I did not know this property had been deeded to me." (R. 474, 475).

Shumway further testified:

> "With reference to Government's Exhibit 127, and to the inscription on that note "paid", I never paid anything to recover that note. That word was written on there after I received the note back. I was not paid anything for deed back. Government's Exhibit 128, being the deed from me to the Arizona Holding Company. That deed was given to me after the Building and Loan

closed, when I went over one morning to check in my business, the papers in Mesa, I called Dan Shreve to the door by telephone from the Adams Hotel, and asked him if the note and mortgage had been used that he asked me to sign some time before that. He said yes. I asked for how much and he said $11,800, and it would be necessary for me to deed back to the Building and Loan some property at Tempe before I could get that note and mortgage. I went over to the County Recorder's office and looked it up and saw where the property was located and went to Tempe and looked at the property and came back and told him I would sign this in order to get these papers back. I did not get any money when I signed the note and mortgage in blank. I never got any money at all from this deal." (R. 476, 477).

Government's Exhibit 135 (Assignment of Error IX, supra) in of like effect. This exhibit is an exemplified copy of a mortgage for $32,000 executed by Lyda Dreyfus to Theo Castle (R. 493, 498). Castle testified:

"I did not personally loan $32,000 on any property located in Arizona. I never loaned any money on that property described in Government's Exhibit 135. I presume I am the one named in this assignment of mortgage from Theo Castle to Security Building and Loan Association, being Government's Exhibit 136 for identification." (R. 494).

With reference to Government's Exhibit 135, supra, Lyda Dreyfus, the mortgagor, testified she did not receive $32,000 for signing the mortgage (R. 499).

The loans evidenced by the foregoing transactions were set up on the books of either Arizona Holding

Corporation, Security Building and Loan Association, or Century Investment Trust, and they were there audited by Government's witness Schroeder, who testified concerning them.[20]

By referring to each of these exhibits, and the objections made to their receipt in evidence, it will appear that counsel for the Government made no effort whatever to account for the originals (footnote 19, supra). Accordingly no foundation was laid justifying the admission of secondary evidence of these important instruments.

Defendants' objections to the admission of these exhibits were comprehensive (R. 471, 472).[21] Counsel for the Government, during the objections, stated they were admitted both under the Federal Statute and Arizona Code of 1928 (R. 471, 472). There is no applicable Federal Statute.[22] The Revised Code of Arizona of 1928, as we shall show, does not apply.

1. The admission of copies of recorded instruments in evidence in the United States District Court for the District of Arizona is governed by the statutes of Arizona existing at the time the Territory of Arizona was admitted into the Union.

Withaup vs. U. S. (CCA8) 127 Fed. 530.

Ding vs. U. S. (CCA9) 247 Fed. 12.

Neal vs. U. S. (CCA8) 1 Fed. (2nd) 637.

U. S. vs. Fay (D. C. Idaho) 19 Fed. (2nd) 620.

In the case of *Withaup vs. U. S.*, supra, the court had under consideration evidence relating to com-

20. He audited, and testified concerning, the following loans referred to in these assignments of error: York loan (R. 658); Dreyfus loan (R. 659); Rayburn loan (R. 661); Arrington loan (R. 667); and Shumway loan (R. 669).

21. The same objection was made to each exhibit (R. 475, 482, 485, 488, 491, 493, 494, 497, 502, 512, 513, 515, 516, 518, 519, 520).

22. Sec. 661, Title 28, USCA, applies only to records of Federal executive departments. Sec. 688, Title 28, USCA applies only to foreign records. These statutes are set forth in the Appendix, page 8.

parison of handwritings. The admissibility of the evidence resolved itself into the determination of what law of Colorado applied, that is to say, whether a statute adopted after the admission of Colorado into the Union, which was in effect at the time the case was tried, applied, or, whether the law, as it existed prior to that state's admission, applied. Judge Van Devanter, then speaking for the Circuit Court of Appeals for the Eighth Circuit, after an analysis of the law upon the subject, summarized it as follows:

> "From what has been said, it follows that the admissibility of the evidence under consideration must be determined, not by the statute of Colorado enacted in 1893, but by the common law, which, by reason of the territorial act of 1861, was the law of Colorado when it was admitted into the Union as a state."

Subsequently, this Court, in *Ding vs. U. S.*, supra, (247 Fed. 12) considered the competency of a witness to testify in a Federal District Court sitting in the state of Washington, who disavowed belief in a Supreme Being. At the time the territory of Washington was admitted into the Union, a witness was not disqualified to testify because of such disbelief. This Court decided that the law of the territory, as it existed when Washington was admitted into statehood, applied, and, citing *Withaup vs. U. S.*, supra, in approval, reversed the trial court. The opinion states the rule as follows:

> "We are of the opinion that the exclusion of the offered witness was erroneous, in that the court should not have determined the competency of the witness by the rules of the common law as in force in the respective original states of the Union when the Judiciary Act of 1780 was pass-

ed, but should have applied the rules which governed the competency of witnesses and the admissibility of evidence in force within the Territory of Washington when that territory was admitted to the Union."[23]

Having determined, therefore, that the law existing at the time Arizona was admitted into the Union governed the admission of copies of these instruments in evidence in the United States District Court in Arizona, we next proceed to ascertain the state of the law at that time.

Arizona was admitted into the Union on February 12, 1912, by the proclamation of President Taft signed on that date.[24] The lower court, and this court, take judicial notice of the proclamation. 23 C. J. p. 101, Sec. 1900.

The last *territorial* legislative enactments governing the admission of the foregoing instruments in evidence are found in the Revised Statutes of Arizona of 1901. The applicable provisions are Secs. 2546 and 2548 of those 1901 statutes.[25] They were amended at the first session of the legislature *after* the terri-

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23. The decisions on this question are collected in Neal vs U. S., 1 Fed. (2nd) 637, cited supra.

24. The proclamation is set forth in the Appendix, page 10. It is also found in Revised Code of Arizona, 1928, Preface 1v.

25. "Sec. 2546. Every instrument which is permitted or required by law to be recorded in the office of the county recorder and which has been proved or acknowledged in the manner provided by laws in force at the time of its execution, may be read in evidence without further proof; and the record of any such instrument or a duly cetified copy of such record may also be read in evidence with the like effect as the original, upon proof of affidavit or otherwise, that the original is not in the possession or under the control of the party offering such record or copy.

Sec. 2548. Certified copies under the hands and official seals, if there be seals, of all territorial and county officers, of all notes, bonds, mortgages, bills, accounts or other documents properly on file with such officers, shall be received in evidence on an equal footing with the originals in all suits now pending and which may be hereafter instituted in this territory, where the originals of such notes, bonds, mortgages, bills, accounts or other documents would be evidence."

tory was admitted into the Union.[26] Sec. 1743 of the Revised Statutes of 1913 omitted that part of Sec. 2546 of the Revised Statutes of 1901, which reads, "upon proof of affidavit or otherwise, that the original is not in the possession or the control of the party offering such record or copy". But, as we have seen, the 1901 statutes prevailed, and Sec. 2546 authorized the admission of copies of instruments there affected *only* upon proof "that the original is not in the possession or control of the party offering it." Sec. 1743 of the Revised Code of 1913 is identical with Sec. 4456 of the Revised Code of 1928, and Sec. 1745 of the Revised Code of 1913 is substantially the same as Sec. 4458 of the Revised Code of 1928, which latter section is copied at page 9 of the Appendix.

It is true that Sec. 2548 (footnote 25) authorizes certified copies of the documents there named, recorded with all county officers, to be received in evidence on an equal footing with the originals, where the originals would be evidence. But Sec. 2548, supra, does not apply to the instruments here. The governing statute is Sec. 2546 (footnote 25) since it is a special statute limited to instruments recorded in the office of *county recorders* only (as these were)

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26. Revised Statutes of Arizona of 1913. The sections comparable with those of the 1901 statutes are:

"**Sec. 1743.** Every instrument which is permitted or required by law to be recorded in the office of the county recorder and which has been proved or acknowledged in the manner provided by law in force at the time of its execution, may be read in evidence without further proof; and the record of any such instrument or a duly certified copy of such record may also be read in evidence with the like effect as the original.

Sec. 1745. Certified copies under the hands and official seals, if there be seals, of all state and county officers, of all notes, bonds, mortgages, bills, accounts or other documents properly on file with such officers, shall be received in evidence on an equal footing with the originals, in all suits now pending and which may be hereafter instituted in this state, where the originals of such notes, bonds, mortgages, bills, accounts or other documents would be evidence."

in contradistincttion to Sec. 2548, supra, which is a general statute applying to instruments recorded in the offices of all county officers. This is a repitition of an invariable rule of statutory construction.

59 C. J. p. 1056, Sec. 623.

Indian Fred vs. State, 36 Ariz. 48, 60, 282 Pac. 930, 935.

Since all these instruments were copies of records of county recorders (footnote 19) then their admissibility in evidence was governed by Sec. 2546 of the Revised Statutes of 1901, which provide that before they are admissible in evidence, the Government was required to prove the originals were not "in the possession or under the control of the party offering" them.

However, assuming the statutes leave a doubt, the question has been decided by the Supreme Court of Arizona in the case of *Mutual Benefit & Accident Association vs. Neale*, 43 Ariz. 532, 549, 33 Pac. (2nd) 604, 611, by an interpretation placed upon statutes of the same import as those invoked by the Government. The court reviewed analagous statutes through the Arizona Codes of 1887 to 1928. The question decided is stated by the Supreme Court of Arizona as follows:

> "It is the contention of plaintiff that section 4454, supra, makes all records of all public officers admissible in evidence, whenever anything which is stated therein as a fact may be material in any case pending in any court, and such record is prima facie evidence of the truth of the fact therein stated, regardless of the nature of the public record, or whether under the general rules of evidence it would have been excluded."

Deciding the question, the court said:

"These two separate sections were carried on substantially unchanged in the Civil Codes of 1901, pars. 2541, 2543, and 1913, pars. 1738-1740. Upon examining them it will be found that they refer to two distinct classes of records. Paragraph 1871 covers the records of notaries public, and certified copies of their records, as well as declarations, protests, and acknowledgements given by them, are not merely admitted in evidence, but are evidence of the facts stated therein, not ocnclusively, of course, but at least sufficient to make a prima facie case. On the other hand, the copies of all other records are only admissible when the records themselves would be admissible, and nothing is said as to their effect. *In other words, the effect of paragraph 1869 was merely to give a copy of the record the same effect as the original, leaving the general question of the admissibility and effect of the record to the general rules of evidence sanctioned by the common law.*" (Italics supplied).

And the court continuing:

"In view of the rule of the common law in regard to the admissibility of judgments in evidence, and the sound and indeed almost compelling reason supporting that rule, and of the revolutionary effect which a literal interpretation of the statute would have upon the law of evidence, we hold that under the consolidation of the two sections it was not the intention of the Legislature to abolish the general rules regarding the admissibility of evidence, and the records referred to in section 4454, supra, are still subject, so far as such admissibility is concerned, to those rules, but that when, under those general rules, they, or properly certified copies thereof,

are admitted, they are prima facie evidence of the facts stated therein."

In *Greenbaum vs. U. S.*, 80 Fed. (2nd) 113, 126, this Court considered the question of admitting secondary evidence of records of a Federal officer, which, except for the distinction with respect to records considered, is exactly similar to the question now presented. In the Greenbaum case, Federal statutes regulating the admission of copies of records in evidence were construed, which, in effect, are like the Arizona statutes. In rejecting secondary evidence, this Court states reasons therefor, which the Supreme Court of Arizona could have adopted in the case cited without affecting the logic of the conclusion of that Court. In the Greenbaum case this Court said (p. 126):

"An equally serious error committed in the receiption of these cards was the inexplicable violation of the best evidence rule."

* * * *

28 USCA, Sec. 661 provides:

"Copies of any books, records, papers, or other documents in any of the executive departments * * * shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department."

* * * *

"The government seeks to avoid the effect of this mass of authority by the assertion that the cards offered in evidence were 'public records,' and that hence, in some manner, any and every violation of the law of evidence committed in their introduction magically vanishes.

There can be no doubt that official records kept by persons in public office, which records are required to be kept either by statute or by

the nature of the office, are admissible to prove transactions occurring in the course of official duties, within the personal observation of the official recording the transactions, without any further guarantee of their accuracy. (Citing authorities).

Assuming that the cards introduced in evidence in this case were public records within the meaning of the above cases, that conclusion does not cure the violation of the hearsay and best evidence rule discussed above. Giving them the full import of the public record rule is merely to conclude that the figures on the card were accurately transcribed from the income tax return in Washington. It throws no light on who signed the original return, hence makes the original return no less inadmissible hearsay. The public nature of these cards may vitiate hearsay in the transcription, but it cannot vitiate hearsay in what is transcribed. The fact that a record is public adds nothing to what is recorded. * * *" (Citing authorities).

Thus, the instruments here involved were not admissible simply because they bear the exemplification of county recorders with whom they were recorded. They are copies of purported originals, and hence, in addition to the limitation of the statutes themselves, are further circumscribed by "the general rules of evidence sanctioned by the common law," as stated by the Supreme Court of Arizona in *Mutual Benefit Health & Accident Ass'n vs. Neale*, supra, and as applied by this Court in *Greenbaum vs. U. S.*, supra. "The general rules of evidence sanctioned by the common law," of course, mean that the best evidence available must be produced, if accessible, and if not, then the next best evidence will be admitted

(22 C. J. p. 974, Sec. 1220) but then only upon a showing that the original evidence is not available. 22 C. J. p. 1045, Sec. 1342.

Thus, the statutes cited, in themselves, point out the error asserted, but had they not, the interpretation placed upon comparable statutes by this Court, and by the Supreme Court of Arizona, does point out the error.

2. *This Court is now bound to follow the statutes of the State of Arizona, and interpretations placed upon such statutes by the Supreme Court of Arizona.*

In view of *Withaup vs. U. S.* and *Ding vs. U. S.*, above cited, probably more should not be said with respect to the law which should have been followed by the trial court in admitting copies of these documents in evidence. Had doubt existed, the question is now set at rest by the Supreme Court in the epochal case of *Erie Railroad Company vs. Tompkins*, 82 L. Ed. (Advance Opinions p. 787), 58 Sup. Ct. Rep. 817, decided April 25, 1938. The Supreme Court there held that, since there is no federal common law, the law to be applied by Federal Courts in any case, except in matters governed by the Federal Constitution, or by Acts of Congress, is the law of the State, and whether that law is declared by statute, or by decision of its highest court, is not a matter of Federal concern. In so deciding, the Supreme Court disapproved the doctrine of *Swift vs. Tyson*, rendered almost a century before in 16 Peters 1, 10 L. Ed. 865. The prevailing rule as announced in *Erie vs. Tompkins*, is as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its

highest court in a decision is not a matter of federal concern. There is no federal general common law."

Thus, there is no alternative affording escape from the error of the trial court in admitting copies of these documents in evidence without accounting for the originals. The voluminous and prejudicial testimony relating to them, and founded upon them was inadmissible, because the foundation for such testimony was the incompetent documents concerning which the testimony pertained.

SIXTH: THE GOVERNMENT'S WITNESS WATT TESTIFIED HE RE-WROTE THE BOOKS OF CENTURY INVESTMENT TRUST AND ARIZONA HOLDING CORPORATION AT THE DIRECTION OF THE DECEASED DEFENDANT, DANIEL H. SHREVE, FROM RECORDS NOT MADE BY HIM, AND FROM INFORMATION OBTAINED BY HIM FROM WHATEVER SOURCES AVAILABLE. HE ALSO TESTIFIED MANY ENTRIES IN THESE BOOKS ARE REFLECTED INTO THE BOOKS OF SECURITY BUILDING AND LOAN ASSOCIATION. THE TRIAL COURT ERRED IN ADMITTING THESE BOOKS IN EVIDENCE, SINCE THEY WERE NOT ORIGINAL ENTRIES OF THE TRANSACTIONS THERE RECORDED, ARE NOT THE BEST EVIDENCE, AND ARE HEARSAY.

ASSIGNMENT OF ERROR

XVIII

The Court erred in admitting in evidence Government's Exhibit 61, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object, your Honor, to the introduction of Government's Exhibits Nos. 61 to 70, inclusive, for identification, for the reason that no proper foundation has been laid for the admission of these books, and for the additional reason that the books are hearsay, and that they are not the best evidence of all or of many of the transactions appearing in such books. For the further reason that the entries therein

are not the primary or original entries, because it now appears from this testimony of Mr. Watt, who is a witness for the Government, that these books were rewritten from information, data, and from books or records, and from information which came into his possession or under his observation after he became employed by the Century Investment Trust or the Arizona Holding Corporation, and that such data and books and records were not prepared by him, and, therefore, these books as a result are a transcription of entries, memoranda or records which were made by other persons. For the further reason that it appears from the indictment herein that the last letter appearing in such indictment is October 24th, 1931, and that the testimony of the witness Watt is, that many of the entries in these books and records were made and reflected transactions after that date. We further object to the admission of these exhibits marked for identification, for the reason that they are incompetent, irrelevant and immaterial, and for the further reason that there (it) has not been shown by the Government that either of the defendants herein made any of such entries, dictated the making of any such entries, or that they knew that any of such entries were made in such books, and in such exhibits."

The full substance of said exhibit is as follows: General Ledger of Century Investment Trust, under one binder, subdivided and marked: Assets, Liabilities, Revenues and Expenses. First entry under Assets November 30, 1931, account No. 111, Notes Receivable; Account No. 112, Accounts Receivable; Account No. 114, Insurance Accounts Receivable; Account No. 116, Accrued Interest Receivable. First

entry under Liabilities October 30, 1929, Account No. 200 authorized capital stock Preferred; Account No. 200-A, unissued capital stock Preferred; Account No. 201, authorized capital stock Common; Account No. 201-A, unissued capital stock Common; Account No. 202, authorized capital stock Series A Preferred; Account No. 202-A, unissued capital stock Series A Preferred; Account No. 203, capital account Preferred; Account No. 204, capital account Common; Account No. 205, capital account Series A Preferred; Account No. 206, Capital Surplus; Account No. 207, earned surplus; Account No. 208, Reserves; Account No. 209, Contingent Fund; Account No. 212, Reserve for Premiums; Account No. 220, Notes and Mortgages Payable; Account No. 223, Contingent Commission Account; Account No. 225, Profit and Loss; First entry under Revenues, October 23, 1931, Account No. 300, interest earned; Account No. 304, stock and bond sales; Account No. 305, cost of stock and bond sales; Account No. 306, Real Estate sales; Account No. 307, cost of real estate sales; Account No. 308, insurance commissions earned; Account No. 315, rentals; Account No. 325, miscellaneous earnings; First entry under Expenses November 30, 1930, Account No. 400, General Expense; Account No. 401; Insurance Department Expense; Account No. 402, Property expense; Account No. 411, Commissions paid on sale of capital stock; Account No. 415, commissions paid (R. 928).

XIX

The Court erred in admitting in evidence Government's Exhibit 70, for all the reasons urged in Assignment of Error XVIII. The full substance of said exhibit is as follows: Stockholders' Ledger Arizona Holding Corporation, subdivided: Real Estate,

Stocks and Bonds, Notes Receivable, Accounts Receivable, Notes Payable, Accounts Payable, Real Estate; first entry dated 6-12-31, including West half Lots 6 and 7, Blk. 16, Mesa; Lots 5 and 6, Blk. 231 of Tucson, with notation "This property came from Mary Robson for stock of Century Investment Trust." Stocks and Bonds: showing various stock transactions with Century Investment Trust, entitled "Insurance Securities Corporation". Notes Receivable includes O. H. and Mary Robson dated 1-23-30 for $1500.00, due 4-23-30, security 740 shares preferred stock Century Investment Trust and 400 shares common stock Century Investment Trust. Accounts Receivable includes items Citizens State Bank, John C. Hobbs, Mesa Agency, Glen O. Perkins, W. H. Perry, O. H. Robson, Security Building and Loan Association. Notes Payable includes items of Century Investment Trust note dated 12-16-21, amount $250,000.00, payable 12-16-36; also note Century Investment Trust dated 5-16-32, amount $12,800.00, due 12-31-33; also Mary Robson note, payable 11-1-30, secured by 80 shares preferred and 80 shares common and 80 shares Series A preferred stock Century Investment Trust; also James M. Shumway note dated 2-23-32, amount $550.00, dated 2-23-37. Accounts Payable, containing miscellaneous accounts with Arizona National Bank, Century Investment Trust, D. H. Shreve and R. F. Watt (R. 931).

XX

Under Sub. (d) of Rule 24, this Assignment of Error is copied in full in the Appendix at page 12. It is summarized as follows:

It relates to the admission in evidence of Government's Exhibit 71, which is the general ledger of Security Building and Loan Association. The re-

ceipt of this exhibit in evidence was objected to for the reason that the book, embraced by the exhibit, is not a record of the original entries, but are transcribed entries; because it is hearsay and not the best evidence; and because it is not shown that these defendants directed or caused any of the entries in these books to be made (R. 932).

The exhibits embraced by these Assignments of Error are books of accounts of either Arizona Holding Corporation, Century Investment Trust or Security Building and Loan Association. They are voluminous and unwieldly, consequently by order of the trial court (R. 901, 902) they, and the remaining books of accounts of these corporations, have been transmitted to the Clerk of this Court pursuant to Sub. (4) of Rule 14.[27]

Exhibit 61 (Assignment of Error XVIII, supra) is the general ledger of Century Investment Trust (R. 355). Exhibit 70 (Assignment of Error XIX, supra) is the stockholders' ledger of Arizona Holding Corporation (R. 368). Exhibit 71 (Assignment of Error XX, supra) is the general ledger of Security Building and Loan Association (R. 412). Government's witness Schroeder, an auditor who testified as a witness for the Government, partly utilized the books of Arizona Holding Corporation and Security Building and Loan Association to prepare his audit and from which he gave testimony (R. 654, 655). Government's witness Fierstone, an auditor who also testified on behalf of the Govern-

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27. These Exhibits are numbered 61 to 78, inclusive (excluding Exhibit 76). They are all books of accounts of either Arizona Holding Corporation, Century Investment Trust or Security Building and Loan Association. The admission of Exhibits 61, 70 and 71 are selected under the foregoing Assignments of Error as typical of all of them.

ment, prepared his audit from the books of Century Investment Trust (R. 688, 689).

On the former appeal this Court, in addressing itself to the admissibility of these books, said:

> "As to the books of the corporations named in the indictment, which corporations it is alleged were mere instrumentalities of the defendants in the perpetuation of the fraudulent scheme, it is clear that these books were admissible without further proof than the connection of the defendants with the organization and control of these corporations. * * * *Shreve vs. U. S.*, 77 Fed. (2nd) 2, 7.

We appreciate the import of the foregoing rule, but we cannot conclude it is inflexible. We thnik we are justified in saying that the rule, if literally applied to this record, goes farther than any heretofore announced by this Court.[28] We believe this Court, upon re-examination of the rule in its application to the present record, will conclude that, notwithstanding the sweep of the rule, it does have a limitation beyond which there may be error.

The testimony of Government's witness Watt, in connection with the exhibits embraced by these Assignments of Error, is sufficiently important to justify that it be set out in the bill of exceptions, for the most part, by questions and answers (R. 344 to 352). Since the testimony comprises several pages, we have transcribed it in the Appendix beginning at page 19.

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28. Cf. Cullen vs. U. S. (CCA9) 2 Fed. (2nd) 524, 525, where it is said: "The defendants Cullen and Dennison were the corporation. They owned the stock and had entire control and ownership of the corporate property." In that situation corporate books were admitted without proof that Cullen and Dennison authorized the entries or had knowledge of them. That, undoubtedly, is a correct conclusion, but the record here does not disclose a parallel situation.

In connection with the testimony of Government's witness Watt, it is important to consider that the record does not disclose that these defendants supervised or dictated the making of a single entry in the books of either Century Investment Trust, Arizona Holding Corporation or Security Building and Loan Association. It is manifest from the testimony of Watt, that many entries in the books were made upon his own responsibility. It is not an exaggeration to say that they were his books. He testified he rewrote the general ledger (Exhibit 61) of Century Investment Trust (R. 344) and brought to date books of Arizona Holding Corporation (R. 347, 348) and that entries from those books were reflected into the books of either Century Investment Trust or Security Building and Loan Association (R. 347, 348, 349). A significant part of his testimony is that Government's Exhibit 61 (Assignment of Error XVIII, supra) which is the general ledger of Century Investment Trust, was *rewritten* by him at the direction of Daniel H. Shreve, a deceased defendant (R. 344, 345). With respect to that important book, therefore, these defendants should not be held accountable, and it is an important book, because it was not only a general ledger, but it was also the book principally utilized by Government's witness Fierstone in the preparation of his audit (R. 691, 692). *Furthermore, Watt testified that neither of these defendants ever requested him to rewrite these books, nor counseled with him in the rewritting of them* (R. 347). Watt testified that he rewrote the books of Century Investment Trust "from whatever information I could get the necessary information from — from whatever source, I should say." (R. 344). Again he testified, "To a great extent I relied upon information *I found myself* in order *to rewrite* these books." (R. 345).

Again, "I did not rewrite any books of the Security Building and Loan Association, *except trace entries* in the Building and Loan books which pertained to the Century Investment Trust or Arizona Holding Corporation. I traced them from the *rewritten* books of the Century Investment Trust." (R. 347). Again, "There had been no entries made in the books of Arizona Holding Corporation since November 4th or 5th, 1929. *I opened* a set of books and brought them up to date." (R. 347, 348).

In view of the former opinion, more cannot be said to point out the error in admitting these books in evidence. We think we are justified in saying that the rule announced by this Court upon the former appeal, in connection with the admission of these books, was not intended to apply a situation such as now appears from this record.

It follows from the error in admitting in evidence the foregoing books of account of Century Investment Trust, Arizona Holding Corporation and Security Building and Loan Association, that the testimony of Government's witnesses Fierstone, based upon his audit of those books, was erroneous, as will appear from the next Assignment of Error.

SEVENTH: THE TRIAL COURT ERRED IN PERMITTING GOVERNMENT'S WITNESS FIERSTONE TO TESTIFY WITH RESPECT TO AN AUDIT MADE BY HIM OF BOOKS OF CENTURY INVESTMENT TRUST, FOR THE REASON SAID BOOKS WERE NOT ADMISSIBLE IN EVIDENCE, AS SHOWN BY THE TESTIMONY OF GOVERNMENT'S WITNESS WATT RELATING TO THESE BOOKS. THE TESTIMONY OF THE WITNESS FIERSTONE CONCERNING THIS AUDIT WAS THEREFORE BASED UPON BOOKS WHICH DID NOT CONTAIN THE ORIGINAL ENTRIES OF THE TRANSACTIONS THERE RECORDED; IT WAS NOT THE BEST EVIDENCE, AND WAS HEARSAY.

ASSIGNMENT OF ERROR XXIII

The Court erred in permitting Government's witness Fierstone to testify from, and in regard to, a summary which he made from books and records of Century Investment Trust, which testimony was admitted over the following objection and exception by counsel for defendants:

> "MR. HARDY: Your Honor, we now object to the witness giving any testimony based upon an audit of the books of the Century Investment Trust for the reason that it has been testified by a witness for the Government, Mr. Watt, that these books, in their entirety, were rewritten by him, and therefore, they are not the original or first permanent entries of the books of the Century Investment Trust, and the Government's witness, Watt, further testified that the records and data and memorandum from which the books were re-written, were filed with other books, records and memorandum of the Century Investment Trust; and for the further reason that it has not been shown by the Government thus far that these defendants, or either of them, caused the books of the Century Investment Trust to be re-written, or that they knew that they were re-written, or that they acquiesced in their re-writing them; therefore, generally, the books are hearsay, incompetent, irrelevant and not the best evidence as to the defendants on trial.
>
> THE COURT: Overruled.
>
> MR. HARDY: Exception." (R. 941).

The witness Fierstone was an auditor employed by the Federal Bureau of Investigation (R. 688). He made an audit of the books of the Century Invest-

ment Trust, and testified therefrom as a witness for the Government (R. 694).

The books and records of Century Investment Trust were not admissible in evidence, as has been shown by Assignments of Error XVIII, XIX and XX. Since these books and records of Century Investment Trust were not admissible in evidence as against these defendants, an extended discussion of the admissibility of testimony of Government's witness Fierstone, based on the audit thereof, is unnecessary, because the error follows as a natural sequence.

EIGHTH: THE COURT ERRED IN ADMITTING IN EVIDENCE RECORDS OF THE FIRST NATIONAL BANK OF PRESCOTT, ARIZONA. THE FIRST NATIONAL BANK OF PRESCOTT IS NOT MENTIONED IN THE INTICTMENT, NOR IN THE BILL OF PARTICULARS. EVIDENCE ON BEHALF OF THE GOVERNMENT DISCLOSED THAT THESE RECORDS WERE NOT IDENTIFIED BY THE PERSONS WHO MADE THEM. ACCORDINGLY NO PROPER FOUNDATION WAS LAID FOR THE ADMISSION OF THESE RECORDS IN EVIDENCE; THEY ARE NOT THE BEST EVIDENCE; AND ARE HEARSAY. THEY WERE NOT ADMISSIBLE UNDER THE ACT OF CONGRESS OF JUNE 20, 1936 (SEC. 695, TITLE 28, USCA) BECAUSE THAT ACT, IF APPLIED TO THIS CASE, IS VOID IN THAT IT OFFENDS THE FEDERAL CONSTITUTION BY NOT REQUIRING THAT DEFENDANTS BE CONFRONTED WITH THE WITNESSES AGAINST THEM; IT IS EX POST FACTO, BECAUSE THE INDICTMENT WAS RETURNED BEFORE THE ACT BECAME EFFECTIVE; AND IT DEPRIVES DEFENDANTS OF DUE PROCESS OF LAW.

ASSIGNMENT OF ERROR

XIII

The Court erred in admitting in evidence Government's Exhibit 84, which was received in evidence over the following objection and exception by counsel for defendants:

> "MR. HARDY: Your Honor, we object to the introduction of this exhibit, for the reason that it is apparent therefrom that some of the items on the pages offered would not be admis-

sible against the defendants in this case, and for the reason no proper foundation has been laid for the admission of the offered exhibit, and for the second reason, it appears from the witness himself that they are not the first or original or primary documents or information from which the entries are made. The witness himself has said they are transcribed entries.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: A transcription of the general ledger of the First National Bank of Prescott, as follows:

RESOURCES	FRIDAY Nov. 8, 1929
Loans & Discounts	$315,355.34
U. S. Gov't Securities	149,880.71
Other Bonds, Stocks, etc.	60,342.70
Leasehold Improvements	3,677.36
Furniture & Fixtures	3,314.86
Interest Paid	2,235.48
Expense General	9,555.32
Suspense	134.44
Stationery and Supplies	2,405.93
Federal Res. Bank, L.A.	28,197.27
Chase Natl. Bank, N.Y.	21,369.58
Western Nat. Bank, L.A.	9,012.30
Boatmens Nat'l Bank, St. Louis	8,970.36
Pacific Nat. Bank, S.F.	3,662.36
1st Nat. Bk. Ariz., Phoenix	831.06
Com'l Nat. Bk. Phoenix	8,471.00
El Paso N/B, El Paso	1,673.89
Transit—Cash Col's	1,186.13
Exchange Maturing	20,000.00
Over & Short	29.90

Cash on Hand	20,715.21
Gold Bullion	781.40
	$678,163.34

LIABILITIES

Capital Stock	$100,000.00
Surplus	25,000.00
Undivided Profits	6,554.04 (red)
Interest Received	9,816.22
Exchange	157.55
Safe Dep. Rentals	134.00
Escrow Fees	28.00
Other Earnings	6.75
Certified Checks	--
Cashiers Checks	8,549.39
Cashiers Vouchers	--
Demand Deposits, Com'l	288,765.23
Demand Certified Dep.	--
Time Deposit Savings	125,448.61
Time Cert.—Dep.	18,220.00
Time Pub. Funds	75,000.00
Postal Savings	27,037.59
	$678,163.34 (R. 922).

XIV

The Court erred in admitting in evidence Item 4 of Government's Exhibit 90, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object to its admission, upon the grounds it has not been properly identified, no foundation has been as yet laid by this witness, or any other witness, for its admission, and for the further reason that it is not the first permanent entry of the transaction, and it is hearsay as to these defendants.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of Item 4 of said exhibit is as follows: Record—letter of First National Bank of Prescott, dated March 8, 1929, addressed to First National Bank of Phoenix, Arizona, enclosing collections and credit items, which includes an item dated March 7, 1929, No. 38, Maker Arizona Holding Corporation, payor, 91-11, amount $20,000; last endorser Us. (R. 924).

XV

The Court erred in admitting in evidence parts of Government's Exhibits 92, 93 and 94, which were received collectively in evidence over the following objection and exception by counsel for defendants:

"MR. FLYNN: We offer in evidence, if the Court please, the parts of Government's Exhibits 92, 93 and 94, which the witness has identified, and in order to keep the record straight as to the part of the exhibits which is going into the record, we ask leave to read them into the record. We are also offering the printed heading which shows what the entries are in regard to.

MR. HARDY: (On voir dire examination of the witness) Mr. Evans, did you testify that these entries were made in your own handwriting, the ones referred to by Mr. Flynn?

A. Yes, the entries on the first line under date of March 7th, over to that column including the amount.

Q. Are those the first permanent entries on that transaction, or are they reflected from other records or memoranda of the Bank?

A. That is only an auxiliary record or memorandum record.

Q. Well, is it the first record of the transaction?

A. It is not.

Q. It is a secondary record?

A. A secondary record.

MR. HARDY: We object to the introduction of the portions of the exhibits referred to by Mr. Flynn, for the reason that it appears they are not the first record of the transaction; for the second reason that no proper foundation has been laid for the admission; that they are hearsay as to these defendants, and that from the exhibits themselves, they appear to be records referring to transactions between the Bank and Joseph E. Shreve, J. G. Cash, and Glen O. Perkins.

THE COURT: They may be received.

MR. HARDY: Exception."

The full substance of said Exhibits 92, 93 and 94 are as follows:

(Exhibit 92): The heading Maker: Shreve, Joseph E., Care of Southwest Union Securities Corporation, San Diego, California, under the date March 7th, 1929; Security or endorser, 3-7-29, endorsed Jesse H. Shreve, Certificate 100, Sunset B. and L. Association, San Diego, $12,500.00; per cent, 7; Number, 127; Amount, $10,000.00.

(Exhibit 93): Maker: Glen O. Perkins, 101 Scott Street, Tucson, Arizona, under date of March 7th, 1929; Security or endorser, 3-7-29, 200 Security G. and L., Tucson, endorser, J. H. Shreve; per cent, 7; Number, 128; Amount $10,000.

(Exhibit 94): Maker: Cash, J. G., address 101 Scott Street, Tucson; Date, March 7th, 1929; Security or endorser, 100 Security B. and L. Association, Tucson; Endorser, J. H. Shreve (R. 924).

XVI

That if the exhibits referred to in Assignments of Error XIII, XIV and XV were admitted in evidence under the authority of Section 695, Title 28, USCA, then the Court erred because (1) the offenses charged in the indictment are alleged to have been committed before the enactment of said Act; (2) that by the express terms of said Act it is prospective only, and therefore said Act did not, and could not, apply to the trial of this case; (3) that if said Act is construed to apply to the trial of this case, notwithstanding the objections raised in subdivisions 1 and 2, supra, then said Act is unconstitutional and void as to these defendants, because (a) it dispenses with the necessity of confronting defendants with the witnesses against them in violation of the Sixth Amendment of the United States Constitution; (b) it alters the legal rules of evidence and requires less or different testimony to convict defendants than the law required at the time of the commission of the alleged offenses, and thus the Act is ex post facto in violation of Section 9, Article 1, of the Constitution of the United States; (c) it deprives defendants of their liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States (R. 926).

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1. Records of First National Bank of Prescott were admitted in evidence as a part of the case of the Government. Admission of these records in evidence was error because no foundation was laid for their admission; they were not original entries; and were hearsay.

The foregoing Assignments of Error relate to transactions reflected by books and records of the First National Bank of Prescott. The Government sought to prove these transactions by the witnesses Trott, Evans and Faulkner. Trott was a teller R.

294). Faulkner was also a teller and assistant cashier (R. 333). Evans was the cashier and director of that bank (R. 303). Evans was indicted for the same offenses for which these defendants were convicted, and he was convicted upon the first trial of the case (R. 181). Before the retrial of the case, the indictment was dismissed as to Evans (R. 181) and he testified for the Government on the retrial (R. 303).

The foregoing Assignment of Errors are selected as examples of errors which relate to the omission in evidence of many records of the First National Bank of Prescott (R. 294 to 343). The First National Bank of Prescott is not named in the indictment (R. 1 to 38) and it is not mentioned in the Bill of Particulars (R. 60 to 81).

The records received in evidence related to a loan of $30,000 made by the First National Bank of Prescott, which apparently was obtained upon three separate notes for $10,000, each signed, respectively, by Joseph G. Shreve (not the defendant Jesse H. Shreve, R. 311) by Glen O. Perkins and J. G. Cash. (Government exhibits 92, 93, 94, R. 313 and 314). *The notes themselves were not offered or received in evidence.* There were introduced in evidence auxiliary or memorandum bank records only of this loan, embraced by Exhibit 84 (R. 298 to 302) Exhibits 92, 93, and 94 (R. 313, 314) and item 4 of exhibit 90 (R. 309).

These exhibits are embraced by the foregoing Assignments of Error XIII, XIV, and XV. Defendants objected to the receipt of these exhibits in evidence because no foundation had been laid for their admission; because they were not the original entries; and were hearsay (R. 300, 309, 312, 313).

Exhibit 84, and Item 4 of Exhibit 90, both of

Beginning with the word "but" in line 22, page 75, and ending with the word "endorser" in line 24, substitute the following:

but no one actually testified the defendant Jesse H. Shreve actually signed the original notes as endorser. The witness Evans testified that "J.H.Shreve which is entered here (referring to the bank memoranda of the original notes, i.e. Exhibits 92, 93 and 94) as endorser of the notes is the defendant Jesse H. Shreve." (R. 314)

which are related to Exhibits 92, 93 and 94, were inadmissible for the reason stated in the foregoing Assignment of Error XIII and XIV, and for the reasons stated in the objection made to them, as pointed out above (R. 300, 309, 312, 313).

By its decision on the former appeal, this Court said:

> "The record contains many other assignments of error relating to the admissibility of books of corporations other than those named in the indictment. With reference to these rulings, it will be sufficient to say that in order to make them competent as against the defendants it is essential to show that the defendants made such entries or caused them to be made or assented thereto."

Shreve vs. U. S., 77 Fed. (2nd) 2, 7.

The records of these loans admitted in evidence over the objection of defendants, as above pointed out, disclose that the endorser upon the notes evidencing the loans to which they relate, apparently was J. H. Shreve, but no one testified that he is the defendant Jesse H. Shreve in this case, or that he actually signed the notes as endorser. The notes evidencing the loan were not offered or received in evidence, nor were they accounted for. Hence, we have the admission of secondary evidence to associate the defendant Jesse H. Shreve with these important transactions. The defendant, Archie C. Shreve, was not in any manner associated with the transactions, either by testimony or records.

With reference to Government's Exhibit 84, Government's witness Trott testified as follows:

> "I made all the items on this page of the exhibit. They were transcriptions of the general

ledger entries covering that day's business, November 8th. This page on this exhibit does not contain the first and original entry of the transaction. The original entries are in the general ledger. This is a transcription of the day's business. It is a transcription of the general ledger, the items transferred from the general ledger to the daily statement, in order to get a picture of the day's business of the bank condensed. Neither J. H. Shreve nor A. C. Shreve supervised or requested me, or required me to make any of the entries on this page of the exhibit. I don't remember whether they had any connection with the First National Bank of Prescott at that time or not. There was no connection with them on my making these entries at that time. It was a part of my duty at the bank on that particular day. I cannot remember that J. H. Shreve and A. C. Shreve were officers or directors of the First National Bank in Prescott at that time." (R. 299, 300).

With reference to Item 4 of Government's Exhibit 90, Government's witness Evans testified as follows:

"The payment for the certificates of deposit was delivered to me by Mr. Brewer. There was a check for $20,000 and some notes accepted subject to the approval of the Board of Directors of the Bank. I know that Government's Exhibit 90 for identification was the form of record that was used by the bank in its collection of items. I have some recollection in regard to the fourth item. That entry is a correct record of the transaction which it purports to record (R. 308).

I did not make the entry referred to in this exhibit. It is not the first original entry of the

transaction. As I stated, it is only the record of items. I believe we refer to it in the letter as cash collection, a letter containing items sent to other banks for collection and credit. There are other records with respect to this transaction." (R. 309).

With reference to Government's Exhibits 92, 93 and 94, Government's witness Evans testified as follows:

"The J. E. Shreve mentioned in this debit memo is not the defendant Jesse Shreve but is Joseph E. Shreve. The Glen Perkins is the Glen Perkins who is co-defendant in this case. The entry on Government's Exhibit 92 for identification was made by me. The original entry on March 7th up to this part was made by me. The first half of the card, over to the column "amount", and all these items on the left, were made by me, and this is one of the records of the bank. It is an auxilliary or memorandum record. We term it the liability ledger card, the description of the note. The nature of the record is what we call a liability record indicating the amount of money being owed by any particular borrower. That entry is a correct record of the transaction which it purports to record. The entry of March 7th, 1929, on Government's Exhibit 93 in evidence, was made by me. It is similar to the record in Government's Exhibit 92. These entries were made by me over to the column "Amount". The right-hand entries were not made by me. Government's Exhibit 94, the entry on that exhibit is a similar exhibit as of the bank. That entry was made by me also. All of those entries which I have identified were

correct records of the transactions which they purport to record.

MR. FLYNN: We offer in evidence, if the Court please, the parts of Government's Exhibits 92, 93 and 94, which the witness has identified, and in order to keep the record straight as to the part of the exhibits which is going into the record, we ask leave to read them into the record. We are also offering the printed heading which shows what the entries are in regard to.

MR. HARDY: (on voir dire examination of the witness) Mr. Evans, did you testify that these entries were made in your own handwriting, the ones referred to by Mr. Flynn?

A. Yes, the entries on the first line under date of March 7th, over to that column including the amount.

Q. Are those the first permanent entries on that transaction, or are they reflected from other records or memoranda of the Bank?

A. That is only an auxilliary record or memorandum record.

Q. Well, is it the first record of the transaction?

A. It is not.

Q. It is a secondary record?

A. A secondary record." (R. 311, 312).

Therefore, in addition to violating the decision of this Court on the former appeal, admission of these secondary records violates the best evidence and hearsay rules prevailing in the following decisions:

Shreve vs. U. S., (CCA9) 77 Fed. (2nd) 2, 7.

Osborne vs. U. S., (CCA9) 17 Fed. (2nd) 246, 248.

Wilkes vs. U. S., (CCA9) 80 Fed. (2nd) 289, 290, 291, 292.

Greenbaum vs. U. S., (CCA9) 80 Fed. (2nd) 113, 121.

Chaffee vs. U. S., 18 Wall. 516, 21 L. Ed. 908.

Phillips vs. U. S., (CCA8) 201 Fed. 259.

Pabst Brewing Co. vs. E. Clemens Horst Co., (CCA9) 229 Fed. 913.

Beck vs. U. S., (CCA8) 33 Fed. (2nd) 107.

The testimony reveals that these defendants had no connection with the First National Bank of Prescott either as officer, director or employee. (Trott, R. 300, Evans, R. 324, Faulkner, R. 337). Therefore invoking the decision of this Court in *Shreve vs. U. S.*, supra, it was "essential to show that the defendants made such entries, or caused them to be made, or assented thereto." That decision was not only ignored in admitting in evidence these records of the First National Bank of Prescott, but it was flagrantly violated.

2. The foregoing records were not admissible under the act of June 20, 1936 (Sec. 695, 695h, Title 28, USCA) because that act does not apply to this case, but, if it does, then it is unconstitutional and void.[29]

Defendants at the trial took the position that, since Sec. 695, Title 28, USCA, did not become operative until June 20, 1936, it could not apply to this case, because the indictment was returned on December 23, 1933 (R. 38) approximately two years and a half before the act became operative. Besides, Sec. 695h of the act provides that Sec. 695 shall be prospective only, and not retroactive.

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29. The applicable sections of the act are set forth in the Appendix at pages 18, 19.

Defendants did not consider that, for the purpose of preserving the question, they were required to invoke the act on behalf of the Government, and then attack its constitutionality. Counsel for the Government met the objections to the admission of these exhibits in evidence sub silentio (R. 300, 309, 312, 313). Counsel for defendants thought they were not required to do more.

The act, by express terms, is inapplicable, and it has been so construed.

Valli vs. U. S., (CCA1) 94 Fed. (2nd) 687.

However, if counsel for the Government, in meeting the foregoing Assignments of Error, invoke the act now for the first time, then defendants assert that it is unconstitutional as applied to this case, and to them, because:

(a) It dispenses with the necessity of confronting defendants with the witnesses against them in violation of the Sixth Amendment to the United States Constitution.

U. S. vs. Elder, 232 Fed. 267, 268.

People vs. Vammar, 320 Ill. 287, 150 N.E. 628.

State vs. Shaw, 75 Wash, 326, 135 Pac. 20.

(b) It alters the legal rules of evidence, and requires less or different testimony to convict defendants than the law required at the time of the commission of the alleged offense, and thus the act is ex post facto in violation of Section 9, Article 1, of the United States Constitution.

Malloy vs. South Carolina, 237 U. S. 180, 59

L. Ed. 905, 35 Sup. Ct. Rep. 507.[30]

NINTH: THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF GOVERNMENT'S WITNESS SCHROEDER BASED UPON HIS AUDIT OF BOOKS AND RECORDS OF CENTURY INVESTMENT TRUST, ARIZONA HOLDING CORPORATION AND SECURITY BUILDING AND LOAN ASSOCIATION. THE WITNESS SCHROEDER TESTIFIED SAID AUDIT WAS MADE IN PART FROM BOOKS AND RECORDS OF CORPORATIONS NOT NAMED IN THE INDICTMENT, AND THE BOOKS AND RECORDS OF SAID CORPORATIONS WERE NOT IN EVIDENCE OR BEFORE THE COURT. FOR THESE REASONS THE TRIAL COURT ALSO ERRED IN REFUSING DEFENDANTS' MOTION TO STRIKE THE TESTIMONY OF THE WITNESS SCHROEDER.

ASSIGNMENTS OF ERROR

XXI

The Court erred in permitting Government's witness Schroeder to testify from, and in regard to, a summary which he made from books and records of Arizona Holding Corporation, Century Investment Trust and Security Building and Loan Association, which testimony was admitted over the following objection and exception by counsel for defendants:

"MR. PETERSON: Q. From your examination of the books of the Security Building and Loan Association now in evidence, did you determine whether or not Loan 26, known as the Rayburn Loan, is included in the figure of $193,-929.46 set out in the financial statements of the Security Building and Loan Association as of December 31st, 1931?

MR. PETERSON: And add to that, Ex-

30. This question has been ably briefed in the case of Greenbaum vs. U. S., No. 8739, now on appeal to the Court, by learned counsel for appellants, and by learned counsel appearing amici curiae. A further discussion of the question would add no advantage here. The decision of the Court in the Greenbaum case undoubtedly will provide the rule of decision to be applied in this case.

hibit No. 160, Loans secured by first mortgage on Arizona real estate.

MR. HARDY: Now, your Honor, we object to that for the reason that it has been testified by the witness that his audit is not based entirely upon the books and records of the corporations named in this indictment which have been introduced in evidence, or which are in Court, but that it has been based upon and is reflected from the examination of other records, books and documents of corporations, or from other sources which are not in evidence, or before this Court, or available.

THE COURT: That is not the witness's testimony. He said his audit is in connection with the books in evidence, and in connection with that, he made other investigations of other corporations, but his audit is based upon the books and records introduced here in evidence. The objection is overruled.

MR. HARDY: Exception.

THE WITNESS: I believe that exhibit is dated 1930, rather than 1931.

MR. PETERSON: December 31st, 1930?

A. Yes, Loan 26 is included.

Q. And from your examination of the books in evidence, can you determine whether or not Loan No. 37, known as the A. Y. York loan is included in the figure of $193,929.46 set out in Exhibit 160 in evidence, in the amount of loans secured by first mortgages on Arizona real estate?

MR. HARDY: Your Honor, for the purpose of the record, may we have the same objection

to all this testimony without the necessity of repeating it?

THE COURT: Oh, yes.

MR. HARDY: And I understand that we have an exception to the ruling of the Court?

THE COURT: All right.

THE WITNESS: It is." (R. 938).

XXII

The Court erred in refusing to strike the testimony on direct examination of Government's witness Schroeder, based upon a summary of books and records of Century Investment Trust, Arizona Holding Corporation and Security Building and Loan Association, for the following reasons urged at the close of the direct examination of said witness:

"MR. HARDY: Now, may it please your Honor, I desire to make a motion to strike all of the testimony of the witness Shroeder based upon his testimony and his audit generally, for the reason that it now appears that his audit is made with respect to the transactions about which he testified upon the records of corporations not named in the indictment, and upon records of corporations which are neither in evidence nor before this Court.

THE COURT: The motion is denied.

MR. HARDY: Exception." (R. 940).

The witness Schroeder was an auditor also employed as a special agent for the Federal Bureau of Investigation (R. 654). He made an audit of the books of Security Building and Loan Association,

Century Investment Trust and Arizona Holding Corporation (R. 655). Defendants contend that the testimony of the witness himself discloses he did not confine his audit to those books, but utilized books and records of other corporations not named in the indictment, or bill of particulars, and other books and records neither in evidence nor before the court. Unless his testimony, based upon such audit, was confined to books and records of Arizona Holding Corporation, Century Investment Trust and Security Building and Loan Association, then his testimony was inadmissible under the objection made thereto by defendants (R. 658, 659) following the decisions of this Court in the following cases:

Wilkes vs. U. S., (CCA9) 80 Fed. (2nd) 285.

Greenbaum vs. U. S., (CCA9) 80 Fed. (2nd) 113.

Osborne vs. U. S., (CCA9) 17 Fed. (2nd) 246.

Pabst Brewing Co. vs. E. Clemens Horst Co., (CCA9) 229 Fed. 913.

At the time the objection was made to the admission of this testimony, the trial court made the following observation:

> "That is not the witness's testimony. He said his audit is in connection with books in evidence, *and in connection with that, he made other investigations of other corporations*, but his audit is based upon the books and records introduced here in evidence." (R. 658).

The witness, on voir dire examination, testified in full substance as follows:

> "I stated I made an examination of the books of the Security Building and Loan Association, Century Investment Trust and Arizona Holding Corporation, for the purpose of making an audit

of those books. The books of those companies which I examined are here in Court. The numbers of the exhibits which I examined are 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 107 to 107-R, 108, 109, 110, 111 to 111-d, 112, 113, 126, 127, 185, 186, 187 and 189 to 202 inclusive, 203, 204. The numbers I have read are solely the records of the Arizona Holding Corporation, the Century Investment Trust and the Security Building and Loan Association. *They are not all the records which I have examined in connection with my audit.* There are a great quantity of records which I have examined that are not in the court room and not in evidence. They are records of the Overland Hotel Company, public records of Pima County, Maricopa County, Yavapai County, records of the First National Bank of Prescott, records of various banks in the southern part of California and Arizona, some of which records are here in evidence, *some of which are not,* and *some of which are not in the court room.* I also examined records in Yuma County. I made an examination of the records of banks in which these various companies had bank accounts; Southwest Bank and Trust Company, either in Phoenix or Tucson; the First National Bank of Prescott. I believe all the records of the First National Bank of Prescott are here except certain correspondence files and things of that sort. I did make an examination of the correspondence files of the First National Bank of Prescott. I seem to recall having been at some bank in California, I can't just name it now. I don't remember making an examination of the records of the California Savings and Commercial Bank in San Diego, California. I believe I did

make an examination of a bank in San Diego in connection with this case. As far as the Arizona Holding Corporation and the Century Investment Trust are concerned, the books here in court are the only ones I have ever seen of those companies. Now, so far as the *Security Building and Loan Association is concerned*, there are large binders with *thousands of sheets of pass book holders' accounts and books of that nature that are not here in the court room, which I examined in connection with this case and from which I made my audit.*" (R. 655, 656).

Again the witness testified:

"*I worked upon the records of the Commercial National Bank in Phoenix in connection with the audit I prepared in this case. I could not say specifically in connection with which loans, probably in connection with some of the loans which I have testified to today.* I haven't the notes which I made from the records of the Commercial National Bank. I don't know where they are." (R. 683, 684).

Again the witness testified, on re-direct examination:

"In so far as matters that I testified to *on direct examination* was based upon my audit which I made, and that audit was made solely from books and records in evidence in this case." (R. 687).

And again, on re-cross examination:

"On cross examination I think mention was made of some other items, but they were not offered, no reference was made to them. Records of the First National Bank of Prescott and the First National Bank of Phoenix and the Over-

land Hotel and Investment Company were mentioned but no reference was made to them. I mentioned I examined them. Records of the First National Bank of Prescott are in evidence and in connection with the audit which I made." (R. 688).

In the latter part of the witness's testimony, as quoted above, we think this Court will observe that the witness sensed the predicament into which he had led the Government. Before the testimony was admitted over the objection made, its competency should have been more assuring than the record discloses.

TENTH: THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE A MORTGAGE EXECUTED BY WM. H. PERRY TO YAVAPAI COUNTY SAVINGS BANK BECAUSE IT IS A TRANSACTION BETWEEN PARTIES NOT NAMED IN THE INDICTMENT; NO FOUNDATION WAS LAID FOR ITS ADMISSION; AND IT IS HEARSAY. THE TRIAL COURT ALSO ERRED IN ADMITTING IN EVIDENCE A SHERIFF'S DEED EXECUTED TO SAID BANK FOLLOWING THE FORECLOSURE OF SAID MORTGAGE, BECAUSE NO FOUNDATION WAS LAID FOR ITS ADMISSION, AND, FURTHER BECAUSE THE PRELIMINARY PROCEEDINGS LEADING UP TO THE EXECUTION OF SAID SHERIFF'S DEED WERE NOT IN EVIDENCE, AND SUCH PROCEEDINGS WERE THE BEST EVIDENCE TO SUPPORT THE ADMISSION OF SAID SHERIFF'S DEED IN EVIDENCE.

ASSIGNMENTS OF ERROR

XXVI

The Court erred in admitting in evidence Government's Exhibit 170, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: Your Honor, we object to the introduction of Government's Exhibit 170 as identified here by Mr. Russell, for the reason it

appears to be a mortgage executed from a person by the name of Perry, to the Yavapai County Savings Bank, a corporation, which is not a corporation named in the indictment herein, and for the reason that it appears to be immaterial and has no bearing upon the issues in this case. It is a hearsay transaction in so far as those defendants are concerned; no proper foundation has been laid for its admission.

THE COURT: Overruled.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: Original mortgage executed April 16, 1930, by Wm. H. Perry, a widower, mortgaging to Yavapai County Savings Bank, a corporation, real estate situated in Yavapai County, Arizona, described as all that certain real estate and property particularly described as follows: All that portion of the Southwest Quarter of the Northwest Quarter of Section Thirty-three (33) in T. Fourteen (14), North of Range Two (2) West of the Gila and Salt River Base and Meridian, in Yavapai County, Arizona, bounded and described as follows: Beginning at the West quarter corner of said Section 33, above Township and Range, thence North 0° 08′ W. 258.0 feet; thence N. 89° 20′ E. 202.3 feet to a stake which is the actual point of beginning; then S. 75° 17′ E. 196.3 feet to an iron pin; thence No. 12° 09′ E. 51.4 feet to a cross on a rock; thence N. 18° 42′ E. 56.4 feet to a cross on a rock; thence N. 36° 36′ W. 56.4 feet to an iron pin marking the Northeast corner of said premises; thence N. 83° 34′ W. 173.4 feet to the Northwest corner of said premises; thence S. 09° 41′ W. 60 feet to an iron pin; thence S. 02° 47′ W. 60 feet to the point of beginning. Acknowledged same date before

R. O. Barrett, Notary Public Yavapai County, Arizona; secures payment of promissory note of even date of mortgage in the sum of $2500.00; recorded at request of Guarantee Title & Tr. Co., April 16, 1930, with the County Recorder of Yavapai County, Arizona. (R. 946).

XXVII

The Court erred in admitting in evidence Government's Exhibit 172, which was received in evidence over the following objection and exception by counsel for defendants:

> "MR. HARDY: We object to its receipt in evidence, your Honor, upon the grounds that no foundation has been laid for its admission, and the preliminary proceedings leading up to the execution of this Sheriff's deed are not in evidence, and they are the best evidence in order to support the admission of this document.
>
> THE COURT: Overruled.
>
> MR. HARDY: Exception."

The full substance of said exhibit is as follows: Sheriff's deed dated May 3, 1930, executed by George C. Ruffner, Sheriff of Yavapai County, Arizona, conveying to Yavapai County Savings Bank, a corporation, property situated in Yavapai County, Arizona, described in Government's Exhibit 170; deed executed in consideration of $2750.00 paid by Yavapai County Savings Bank to said Sheriff under certificate of sale on foreclosure covering said premises; recorded at request of Favour & Baker, May 3, 1935, Book 158 of Deeds, page 234, records of Yavapai County, Arizona (R. 947).

Assignment of Error XXVI. This Assignment of Error pertains to the admission in evidence of Government's Exhibit 170, which is a mortgage executed by Wm. H. Perry to Yavapai County Savings Bank. The mortgage was identified by Government's witness Russell who was the secretary of Yavapai County Savings Bank (R. 547). The property described in the mortgage is the same property described in a deed executed by Dean B. Blackburn to Arizona Holding Corporation, embraced by Government's Exhibit 144 (R. 517). Blackburn did not testify. The exemplified copy of the deed executed by Blackburn was received in evidence, over the objection of defendants, without further proof than exemplification (R. 516, 517, 518). The Blackburn deed, therefore, falls within the objection made to its admissibility, which were made to instruments of the same import, heretofore discussed in Assignment of Error XIII, IX, X and XII. Manifestly, the Perry mortgage (Government's Exhibit 170) was introduced in evidence for the purpose of showing that, whereas Blackburn deeded the property to Arizona Holding Corporation, the property was, in fact, owned by Perry, who mortgaged it to Yavapai County Savings Bank. Obviously, the Perry mortgage was not admissable, because Perry was not called to testify with respect thereto, and no competent proof was offered to show that Perry owned the property described in his mortgage, or that Blackburn himself did not own the property.

The effect of the evidence is this: Since Blackburn conveyed to Arizona Holding Corporation identical property conveyed by Perry to Yavapai County Savings Bank, then Blackburn could not have owned the property which he conveyed. Neither Blackburn, nor Perry, testified they owned the property. The

only evidence of ownership by Perry is the inference arising from the evidence that a party by that name mortgaged the property to Yavapai County Savings Bank.

With this state of the record, therefore, the objection that the Perry mortgage was hearsay, and that no proper foundation had been laid for its admission, was sound (R. 547, 548).

22 C. J. p. 974, Sec. 1220.

Assignment of Error XXVII. This Assignment of Error relates to the admission in evidence of Government's Exhibit 172 (R. 551, 552) which is a sheriff's deed presumably issued after the sale under the judgement foreclosing the Perry mortgage referred to in the foregoing Assignment of Error XXVI.

The trial court admitted in evidence the sheriff's deed over the objection that no foundation had been laid for its admission; that the preliminary proceedings leading up to the execution of the sheriff's deed were not in evidence; and that such proceedings were the best evidence to support the admission of the sheriff's deed (R. 551).

Neither of these defendants, nor the corporations named in the indictment, were parties to the proceedings foreclosing the mortgage. And, again, Yavapai County Savings Bank, the grantee under the sheriff's deed, was not mentioned in the bill of particulars, which was the ground of another objection (R. 550).

We are at a loss to understand upon what theory counsel for the Government offered this sheriff's deed, or upon what rule of law the trial court relied to permit of its admission in evidence, in view of

the state of the record and the objections made to it. Unquestionably, before the sheriff's deed was admissible at all, the preliminary foreclosure proceedings should have been first proved, as was raised by the objection, because otherwise no foundation whatever was laid to permit the sheriff's deed to be received in evidence. 34 C. J. p. 1067, Sec. 1508.

The rule of evidence violated here is one of immemorial recognition. It is stated, in common with other courts, by the Supreme Court of Arizona, in the case of *Mutual Benefit Health & Accident Ass'n vs. Neale*, 43 Ariz. 532, 546, 33 Pac. (2nd) 604, 610, as follows:

> "As a matter of common law, it has long been the rule that a judgment in personam, as against any person who is a stranger to the cause, is evidence only of the fact of its own rendition, *and may not be introduced to establish the facts upon which it has been rendered.* (Citing authorities). And the test of whether a person is a stranger is whether he was interested in the subject-matter of the proceeding, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceeding, and to appeal from the judgment. (Citing authorities." (Italics supplied).

Since the judgment was not admissible in evidence against these defendants, then the sheriff's deed, following the judgment, for more cogent reasons was inadmissible. Here we simply have the sheriff's deed. The preliminary proceedings authorizing it are not in evidence,—not even the judgment. In fact, the trial court gave the sheriff's deed more approba-

tion than the law gives judgments as between strangers to them. For illustration:

> "A judgment is not admissible in evidence against a person who was not a party, nor in privity with a party, to the suit wherein it was rendered, or at least it is not admissible against him as evidence of the facts which it adjudicates or determines or on which it is based, and which are in issue in the subsequent action, unless the judgment or decree is in rem, although it may be evidence of certain other matters. Certainly, as against a person who is not a party to the action, nor in privity with a party, a judgment is not conclusive evidence of the facts determinded thereby. Some courts hold that, although a judgment may not be binding or conclusive on a third person, nevertheless it may be competent against him to prove prima facie the facts recited therein; but other courts hold that if, by reason of lack of identity of parties, it is not conclusive of the questions of fact involved therein, it is not even a circumstance which the jury may consider on that point." 34 C. J. p. 1050, Sec. 1484.

See also 34 C. J. p. 1043, Sec. 1480.

The harm is obvious, since the Perry mortgage struck directly at the bona fides of the Blackburn deed.

ELEVENTH: THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF GOVERNMENT'S WITNESS YORK CONCERNING COMMUNICATIONS BETWEEN THE WITNESS AND HIS DAUGHTER RELATING TO TRANSACTIONS ON BEHALF OF ONE OF THE CORPORATIONS NAMED IN THE INDICTMENT, BECAUSE THE TESTIMONY WAS HEARSAY. FOR THIS REASON

THE TRIAL COURT ALSO ERRED IN REFUSING DEFENDANT'S MOTION TO STRIKE THE TESTIMONY.

ASSIGNMENT OF ERROR

XXVIII

The Court erred in admitting the testimony of Government's witness A. W. York, which was admitted over the following objection and exception by counsel for defendants:

THE WITNESS: "Q. Did you, on or about the 20th day, about the month of December, 1930, mortgage any property in Navajo County, Arizona, to the Security Building and Loan Association? A. I signed a mortgage, yes, sir. Q. And where did you sign that mortgage? A. Oakland. Q. In Oakland? A. Yes, sir. Q. How did you happen to sign that mortgage?

MR. HARDY: Now, your Honor, we object to the answer to that question, because no connection has been shown that would justify an answer by the witness to that question, and for the further reason that up to that time no proper foundation has been laid with respect to any testimony with respect to the mortgage.

THE COURT: Go ahead, read it.

MR. HARDY: Exception.

THE WITNESS: A. My daughter wrote me— Mr. Crouch: We did not hear. The witness: My daughter wrote me that the Company she had been connected with had a proposition for me and wanted me to sign some papers.

MR. HARDY: Now, your Honor, we move that that answer be stricken, because it is hear-

say testimony as to these defendants, a letter from his daughter to him.

THE COURT: It may stand. Go ahead.

MR. HARDY: Exception.

THE WITNESS: My daughter wrote me saying that the Company that her husband was conected with had a proposition for me in Arizona and that they had something for me to sign, the purpose, as I later on understood, was for me to come over here and take charge of a ranch in the vicinity of Holbrook." (R. 948).

The witness York testified on behalf of the Government at the former trial of this case, but died before this retrial of the case (R. 558). His testimony given at the former trial was read by Government's witness Walker, who reported the tstimony on the first trial (R. 558). York and his wife executed a mortgage to Security Building and Loan Association on property therein described, an exemplified copy of which was received in evidence as Government's Exhibit 175 (R. 562). (This is also one of the instruments referred to in Assignments of Error VIII, IX, X, XI, and XII.) Over the objection of defendants, the witness York testified his daughter wrote him that the company she had been connected with had a "proposition" for him to sign some papers (R. 560, 561). He did sign the mortgage referred to, which was delivered to Security Building and Loan Association (R. 562). The witness York was the father-in-law of defendant Perkins, who, as we have seen, testified as a witness on behalf of the Government (R. 558). No testimony was given that either of these defendants prompted Perkins' wife to write

her father concerning this transaction, or that they even knew about it. Accordingly, in a most flagrant aspect, testimony of the witness York concerning communications between his daughter and him was hearsay. The mortgage which the witness York, and his wife, signed, embraced lands owned by John McLaws and Nellie McLaws, which the witness York testified he did not purchase from them (R. 559, 560). (Compare Government's Exhibit 175 (R. 562) and Government's Exhibit 178 (R. 567). The mortgage was also signed by Fannie York, wife of the witness York, but she did not testify, and further objection was made to the admission of the mortgage in evidence on that ground (R. 562).

The error of this hearsay testimony is so obvious that we hesitate to burden the Court with argument on it. Communications between the witness York and his daughter, without proof that they were prompted by these defendants, or that they knew about them, totally ignored the rule against hearsay evidence.

Having heard the testimony, it should then, at least, have become evident that it was hearsay. Hence, the trial court should have granted defendants' motion to strike it (R. 560, 561).

If, as often seems peculiar to mail fraud cases, defendants are to be stripped of the protection which fundamental rules of evidence accord them, then the time is opportune, it seems to us, for this Court to emphasize that convictions following such methods will be corrected to the end that procedure under salutary standards of law may be preserved. A similar circumstance prompted this Court to reverse the judgments on the former appeal.

Shreve vs. U. S., 77 Fed. (2nd) 2, 5.

TWELFTH: THE TRIAL COURT ERRED IN REFUSING TO PERMIT DEFENDANTS' WITNESS CRANE, A CERTIFIED PUBLIC ACCOUNTANT, TO TESTIFY THAT PRACTICES OF ACCOUNTING INDULGED IN BETWEEN CENTURY INVESTMENT TRUST AND SECURITY BUILDING AND LOAN ASSOCIATION, AS RELATED BY GOVERNMENT'S WITNESS FIERSTONE, WERE IN ACCORD WITH ACCEPTED ACCOUNTING PRINCIPLES.

ASSIGNMENT OF ERROR

XXIX

The Court erred in refusing to permit defendants' witness Crane to testify, on direct examination, over the following objection by counsel for the Government, and exception by counsel for the defendants, as follows:

"Q. Is it in accordance with the accepted accounting principles for a holding company to absorb a charge to the cost of this investment in a subsidiary corporate company, proportions of the expense of the operation of a subsidiary?

MR. FLYNN: Object to that on the ground it is invading the province of the jury and calling for a conclusion and opinion.

MR. HARDY: He is an expert, your Honor, and I asked him about the accepted practice of accounting.

THE COURT: Oh, well, let the jury determine that.

MR. HARDY: Exception, please. With respect to this character of accounting as between a holding company and its subsidiary, can you state, as a Certified Public Accountant, whether

that manner of accounting between the holding company and a subsidiary is approved by the Internal Revenue Bureau of the United States Government?

MR. FLYNN: Object to that on the ground it is immaterial and that it does not tend to prove or disprove any of the issues in this case, and calling for a conclusion and opinion of the witness and invading the province of the jury.

THE COURT: Sustained.

MR. HARDY: Exception." (R. 950).

Government's witness Fierstone, as we have seen, audited the books of Century Investment Trust and testified from that audit (R. 694, 695). During the giving of testimony, he referred to expense items of Security Building and Loan Association which were paid by Century Investment Trust. The full substance of his testimony in this respect is as follows:

"Well, on December 31st, 1929, the Tucson office of the Building and Loan Association had a loss of $1,513.65, which was assumed by the Century Investment Trust and added to the cost of this stock. On October 31st, 1930, the Century Investment Trust had spent $17,552.39 as expenses or advances to the Security Building and Loan Association during the preceding year, so that sum was added to the cost of the stock, and on October 31st, 1931, the sum of $20,391.46 was also added to the valuation of that stock, representing sums paid out as expenses and advances to the Security Building and Loan Association

during the preceding year. Those several additions, plus the original cost, add up to $99,457.50. The Century Investment Trust had been in business, as evidenced by the books of the company on December 31st, 1929, two months." (R. 705).

On cross examination the witness Fierstone further testified as follows:

"I stated that there is carried forward on the Century Investment Trust books an account called 'Security Building and Loan Association expenses' amounting to $21,868.88. The breakdown on that figure is: the books of the Century Investment Trust carried an account known as 408, or 101, labelled 'Security Building and Loan, Phoenix, Expense.' For the twelve months ending October 31st, 1930, the balance in that account was $16,933.23. Of that amount $303.79 occurred in November and December, 1929. Now, the same account in November and December, 1930, is reflected $5,239.44. By taking out the two months of November and December of 1929, and adding the two months of November and December, 1930, would give you a figure for the twelve calendar months of January to December, 1930, amounting to $21,868.88. I didn't make any allocation of the several items of the salary account for that period. The salaries comprises a substantial part of it. The salaries of D. H. Shreve, G. O. Perkins, R. F. Watt and E. F. Young, and I believe M. Gondie. There is nothing set up there at all for J. H. Shreve or A. C. Shreve. There is nothing in the books to show who the people I have named were working for. I don't know whether they were working for both the Century Investment Trust and the Security

Building and Loan Association. But those salaries are charged in that account and added to the cost of the stock of the Security Building and Loan Association, which was carried on the books of the Century Investment Trust. Whether it is unusual depends upon your method of bookkeeping. Some people add the expense of the company to the cost of stock. It would all depend upon other circumstances, and you can't lay down a general rule on that. Some public utilities companies do it to a certain extent. I have never done any income tax work so I don't know anything about the permissible practice for the Income Tax Bureau and other agencies of the Government." (R. 717, 718).

Defendants' witness Crane, referred to in the foregoing Assignment of Error, was a certified public accountant (R. 830). He had made an audit of the boks of Security Building and Loan Association from its inception to November 14, 1931, at the direction of the Superior Court of Maricopa County, Arizona, in receivership proceedings (R. 830). Defendants sought to have the witness Crane testify, as an expert, upon the question of approved accounting practices with respect to Century Investment Trust, as a holding corporation, in absorbing expenses of its subsidiary, Security Building and Loan Association. The witness Crane had testified, in full substance, as follows:

"I heard the testimony of Mr. Fierstone to the effect that during the period of December 31st, 1930, certain items of expense in connection with the operation of the Security Building and Loan Association were paid or obsorbed by the Century Investment Trust." (R. 834).

Thereupon he was asked, as shown by the foregoing Assignment of Error, the following questions by counsel for defendants:

"Q. Is it in accordance with the accepted accounting principles for a holding company to absorb a charge to the cost of this investment in a subsidiary corporate company, proportions of the expense of the operation of a subsidiary?

MR. FLYNN: Object to that on the ground it is invading the province of the jury and calling for a conclusion and opinion.

MR. HARDY: He is an expert, your Honor, and I asked him about the accepted practice of accounting.

THE COURT: Oh, well, let the jury determine that.

MR. HARDY: Exception, please. With respect to this character of accounting as between a holding company and its subsidiary, can you state, as a Certified Public Accountant, whether that manner of accounting between the holding company and a subsidiary is approved by the Internal Revenue Bureau of the United States Government? (R. 834).

The United States Attorney objected on the ground the question was immaterial; that it did not tend to prove or disprove any issues in the case; that it called for a conclusion and opinion of the witness; and invaded the province of the jury (R. 835). The court

sustained the objection and defendants excepted (R. 835).

Previously the court, as we have shown, refused to permit defendant Archie C. Shreve to testify with respect to conversations between Government's witnesses Perkins and Hobbs, about which they had testified.[31] In giving their defense, that was discouraging enough, but now the trial court refused to permit defendants' witness Crane to give his expert opinion with regard to accounting methods about which Government's auditor Fierstone had previously testified. The advantage was all on the side of the Government. The trial judge disposed of defendants' contention by remarking, "Oh, well, let the jury determine that". (R. 834). All the jury had before them upon which to determine the question was the one-sided testimony of Government's witness Fierstone.

The case of *Rowe vs. Whatcom County Ry. & Light Co.*, 44 Wash. 658, 87 Pac. 921, confirms the error. The action was for damages for personal injuries. Physicians called by defendant testified to the character of plaintiff's injuries and the tests applied to determine it. The trial judge refused to permit the physician called by plaintiff to give testimony in contradiction of the physicians called by defendant, because he thought, as the trial judge thought here, the question was for the jury. The Supreme Court of Washington held this was error. The case should be accepted as a satisfactory precedent by this Court, because by coincidence the opinion was written by Judge Rudkin while sitting as a

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31. Assignments of Error III, IV, V, VI, and XXXV, supra.

member of the Supreme Court of Washington, and the trial in the lower court was presided over by Judge Neterer. Judge Rudkin, then speaking for the Supreme Court of Washington (87 Pac. 922) said:

> "The reason assigned by the court for its ruling was that the question whether the tests applied by the witnesses for the respondents were fair or proper was for the jury. In this the court erred. The witness was asked his opinion on a matter involving scientfic and technical knowledge, not within the experience of the ordinary witness or juror, and should have been permitted to answer * * *".

Upon the question generally see: 22 C. J. p. 737, Sec. 827.

THIRTEENTH: THE TRIAL COURT ERRED IN CHARGING THE JURY WITH RESPECT TO DENFENDANS' CONNECTION WITH THE SCHEMES ALLEGED IN THE INDICTMENT; AND THE TRIAL COURT ALSO ERRED IN REFUSING TO INSTRUCT THE JURY WITH RESPECT TO THE FAILURE OF PROOF CONCERNING THE ALLEGATION IN THE INDICTMENT THAT DEFENDANTS FALSELY REPRESENTED THAT SECURITY BUILDING AND LOAN ASSOCIATION HAD A PAID-IN CAPITAL STOCK OF $300,000.00.

ASSIGNMENT OF ERROR

XXXII

The Court erred in charging the jury as follows:

"On the question of the birth of the alleged schemes, all the Government need to prove is that that happened when fraud of the character denounced by the indictment was first consciously and intentionally practiced by one or more of the parties

charged therewith. If it may have been only a development consciously brought into action out of a scheme in its origin legitimate and honestly intentioned, proof of that fact, convincing beyond a reasonable doubt would be sufficient, and if you are convinced beyond a reasonable doubt that these defendants, or either of them, were at any of the times a party to a scheme to defraud, as charged in the indictment, a withdrawal from such scheme could not be effected by intent alone. There must have been some affirmative action on the part of the defendants to effect such withdrawal." (R. 953).

Defendants excepted to the foregoing charge for the reason that the Court did not define to the jury what would constitute an affirmative act (R. 896).

XXXIII

The Court erred in refusing to include in its charge defendants' requested instruction number 43, which is as follows:

> "You are instructed that there has been no evidence introduced or received in this case that the defendants, or either of them, made or caused to be made any representations that the Security Building and Loan Association had a paid-in capital stock of $300,000.00, as alleged in the indictment." (R. 954).

Assignment of Error XXXII. Under the indictment allegations, the alleged schemes had their birth upon the organization of Arizona Holding Corporation, Century Investment Trust and Security Build-

ing and Loan Association. The issue was raised not only to defendants' participation in the schemes, but also with respect to their withdrawal from participation in the management of the last named corporations. The defendant Archie C. Shreve testified that when their brother, Daniel H. Shreve, came to Phoenix, the latter took control and management of the corporations. (R. 769, 770). His testimony is supported by the testimony of Government witness Hobbs (R. 403, 404, 580, 581). Undoubtedly, this testimony prompted the trial court to give the instruction embraced in the foregoing Assignment of Error XXXII.

Upon the question of withdrawal from the schemes, the court charged the jury that it could not be effected by intent alone, but that the withdrawal must have been manifested by some "affirmative action" on the part of the defendants "to effect such withdrawal." (R. 868). Defendants excepted to the charge because the court did not define what would constitute an affirmative act which would effect the withdrawal. (R. 896). Were these acts manifested by formal resignations from the officerships and boards of directors of these corporations, or by the formal action of the boards of directors accepting such resignations, or by operation of law, or how? Judge Wilbur, when speaking for the Supreme Court of California in *Young vs. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36, 41, in commenting upon the failure of the trial court to define in an instruction the term "proper warning" in its application to negligence, said:

> "Aside from the proposition that this instruction submitted to the jury, without any standard

for the determination of the same, the question of what constituted 'proper warning' of the danger of the approaching train, the instruction was objectionable because the complaint did not allege the failure to have a flagman at the crossing as a basis of the claim of negligence. The instruction should not have been given."

The court should always explain the meaning of legal or technical terms occurring in its instructions.

64 C. J. p. 617, Sec. 556.

Buckeye Cotton Oil Co. vs. Sloan (CCA6) 250

Fed. 712, 725, 726.

Assignment of Error XXXIII. The indicement alleges that defendants falsely represented that $300,000.00 of the capital stock of Security Building and Loan Association had been paid in, whereas the paid-in capital stock did not exceed $45,000.00. (R. 5, 6). Not one syllable of evidence was introduced by the Government to prove that allegation. Therefore, defendants requested the trial court to instruct the jury (requested instruction No. 43) that no evidence had been received that defendants caused such representation to be made. (R. 898). The trial court refused to give the requested instruction (R. 895).[32]

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32. It should be said that, whereas defendants actually excepted to the refusal of the trial court to give this instruction, the exception does not appear in the bill of exceptions. The trial court designated defendants' requested instructions which were refused (R. 894) and the reporter's transcript of the testimony discloses that defendants made the following exception:

"MR. HARDY: May we have an exception, your Honor, to those instructions requested by the defendants which were

Assuming this Court will consider the error assigned, it seems sufficient to say that, since the record does not disclose any proof whatever of this indictment allegation, it was clearly erroneous for the court to refuse the requested instruction.

FOURTEENTH: THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR AN INSTRUCTED VERDICT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THESE DEFENDANTS USED THE MAILS TO EXECUTE THE SCHEMES, OR ANY OF THEM, ALLEGED IN THE INDICTMENT.

ASSIGNMENT OF ERROR

XXXIV

The Court erred in denying defendants' motion for an instructed verdict made at the close of the Government's case, and at the close of the whole case, for the reason that the evidence was insufficient to prove the offenses charged, for the following reasons:

1. The evidence was insufficient to prove the commission by said defendants, or either of them, of the alleged offenses charged in the indictment.

2. The evidence was insufficient to prove that said defendants, or either of them, placed or caused to be placed in the United States Post Office for the District of Arizona, the letters and printed matter set forth in the indictment.

3. The evidence was insufficient to show or prove

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refused or not given by your Honor, and may that exception go to each of those which were refused separately?"

We appreciate the rule that, in order for claimed error to be reviewable, the exception to it must be embodied in the bill of exceptions (O'Brien, Manual of Federal Appellate Procedure, p 20) but this Court may notice the error, although the exception does not appear in the record. Id. p. 21.

that said defendants, or either of them, did, or could, by the mailing of the letters or printed matter received in evidence, execute the schemes or artifices set forth in the indictment (R. 954).

At the close of the Government's case, defendants presented a written motion for an instructed verdict directed to each count of the indictment (R. 730). The motion was comprehensive (R. 101, 121) but only that part of it which relates to the sufficiency of the evidence to connect these defendants with mailing the indictment letters is now invoked. Although separately stated, the grounds of the motion were the same as to each count (R. 730, 101). At the close of the whole case, the motion was again presented. (R. 849). The trial court denied the motion, and defendants excepted. (R. 732, 849).

Section 338, Title 18, USCA, confers jurisdiction upon federal courts to try the offense there denounced only when the United States Mails are used for the purpose of executing a fraudulent scheme. The scheme may be ever so wicked, but, unless the mails are used, the Federal courts have nothing to do with it.

The question is not raised that the indictment letters were not mailed by someone, or that they were not received by the persons named in the indictment. Defendants' position is that the evidence does not disclose they had anything to do with mailing the letters.

The receipt of the indictment letters through the mails by the addresses named therein is no proof that these defendants, or either of them, mailed them. As was said in *Freeman vs. United States* (CCA3) 20 Fed. (2d) 748, 750:

"The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such a scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that is may be proved by the presumption arising from the postmark, * * * or, under the general rule that a postmark is prima facie evidence that the envelope had been mailed, * * * That, concededly, is the rule in civil cases; but it leaves unanswered the question—, vital in criminal cases—*who mailed it?*"

Again, it is said in *Beck vs. United States* (CCA8) 33 Fed. (2d) 107, 111:

"That the mails were used is clear. That the defendant Beck is bound if Barrett used the mails in the ordinary course is not open to serious dispute. The law does not now require an intent to use the mails as part of the scheme, as formerly. It is sufficient if they are used. Beck placed Barrett in the position of general manager of the corporation, leaving to him the direct management of the business while Beck primarily looked after his own business. Beck employed and paid stenographers, which shows a contemplated use of the mails. *Aside from the fact that the letters purport to bear Barrett's signature, the record is barren of proof that he signed them or mailed them. This is insufficient to bind either Barrett or Beck.*" (Italics supplied).

The indictment letters received in evidence, and the proof of their mailing, disclose that not one of

them was signed or mailed by either defendant. If there could be any doubt with respect to this statement, it is entirely dissipated by the frank, but accurate, statement of the United States Attorney during an objection made by him to testimony of defendant Archie C. Shreve, concerning the letters, when he interposed the following significant objection:

> "Q. (propounded to defendant Archie C. Shreve by his counsel): Were any of those exhibits, to your knowledge, prepared in San Diego, California?
>
> A. They were not.
>
> Q. Were any of them ever prepared, or was the preparation or the supervision of any of them done in San Diego, California?
>
> MR. FLYNN: Just a minute, we object to that on the ground that no foundation has been laid, *has not been shown he had knowledge of where or how or who prepared them, or who didn't prepare them, therefore, his testimony is incompetent.*
>
> THE COURT: Yes; he doesn't know where they were prepared (R. 794, 795, 796).

Coming, as it does, from the United States Attorney, this statement in itself demonstrates the error assigned. While the factual aspect of the objection related to defendant Archie C. Shreve only, it applies with equal force to defendant Jesse H. Shreve, because the condition of the record in this respect, as to both defendants, is identical. It is incredible

that one could mail a letter with criminal intent who did not know how, or who prepared it, or who didn't prepare it, as said by the United States Attorney.

Let us fortify the statement of the United States Attorney by the record. Government's witnesses Hobbs, Watt, Shumway and Perkins gave the only testimony relating to the *mailing* of these letters. Their testimony is important, and, in order that it may be conveniently marshalled, it is set forth in the Appendix to this brief beginning at page 30.

The testimony adverted to, and which we have set out in the Appendix to this brief, constitutes the case for the Government insofar as the mailing of the indictment letters is concerned.[34] When analysed it shows this:

(a) Neither of these defendants signed, or personally mailed the letters.

(b) It was a business custom to mail the letters.

(c) The letters were mailed in the general or regular course of business.

A business custom may be sufficient to establish the mailing of the letters, but the evidence must show, as was said in *Freeman vs. U. S.*, (CCA3) 20 Fed. (2nd) 748, 750, that it was a "business custom of *defendants*." The Government has not shown that by the evidence. True, circumstantial evidence of

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34. The defendant Archie C. Shreve testified: "I never heard of any of these letters or knew anything about them, or had anything to do with them in any manner whatsoever. The first time I knew about them was at the inception of this lawsuit when the indictment was returned. They might have been set forth in the other indictment." (R. 796).

mailing is sufficient, which might comprehend mailing "in the general or regular course of business." But those circumstances must comprise acts or facts directly attributable to these defendants. *Freeman vs. U. S.*, supra. In the case of *Greenbaum vs. U. S.*, 80 Fed. (2nd) 113, 125, circumstantial facts of mailing the indictment letter were held sufficient to bind the defendants Greenbaum, but the opinion significantly states that the letter there involved was mailed by the "admitted secretary and agent of the Greenbaums."

There is no direct evidence that these defendants mailed the indictment letters. If it is suggested that there are circumstances of their mailing them, then it should be said that, since the use of the mails is the sine qua non of the crimes charged, then circumstantial evidence of mailing should be proved *beyond a reasonable doubt.* The circumstances established fall far short of proving, beyond a reasonable doubt, that these defendants mailed the letters.

Whatever may be the rule elsewhere (16 C. J. Sec. 1571, p. 766) the Federal courts hold that all circumstantial facts essential to conviction must be proved beyond a reasonable doubt. The Circuit Court of Appeals for the First Circuit, in *Roukous vs. U. S.*, 195 Fed. 353, states the rule as follows:

> "Therefore, remembering that, while it is not necessary that any particular circumstance should of itself be sufficient to prove a criminal case beyond a reasonable doubt, yet it is necessary that each circumstance offered as a part of the combination of proofs should itself be maintained beyond a reasonable doubt, and should have some

efficiency, so far as it has efficiency to a greater or less range, beyond a reasonable doubt, and at least be free from the condition of being as consistent with innocence as with guilt, * * *"

The case here fits squarely into the pattern of the foregoing decision.

In reversing the District Court for the District of Arizona, in the case of *Paddock vs. U. S.*, 79 Fed. (2d) 872, 875, 876, this Court, speaking through Judge Wilbur with regard to an instruction dealing with the probative effect of circumstantial evidence in a fraud case, said:

"The rule with reference to the consideration of circumstantial evidence by the jury is thoroughly settled. This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. 2 Brickwood Sackett In structions to Juries, Sec. 2491, et seq. We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable doubt as applied to circumstantial evidence."

The case of *Kassin vs. U. S.*, (CCA5) 87 Fed. (2nd) 183, 184, citing with approval on this point the case of *Paddock vs. U. S.*, supra, is particularly in point.

The testimony of mailing, standing alone, and as aided by the United States Attorney's interpretation of it, leads to the conclusion that the Government

has not sustained the burden of proving, beyond a reasonable doubt, that these defendants used the mails to execute the schemes alleged in the indictment. Accordingly, the motion to direct the verdicts should have been granted.

CONCLUSION

More should not be said in view of the proportions of the brief. Much more could be said, but we respect the admonition that there must be a limitation to errors assigned. The record contains many errors not assigned, which we shall not point out. A random inspection of the record will reveal them.

We hold in high esteem learned counsel who represented the Government below, but the record, as we have pointed it out, justifies the assertion that they looked more to gaining the verdicts than finally sustaining them.

Prejudicial errors, we think, have been demonstrated, to the end that justice and right require that they be corrected. Accordingtly, these defendants respectfully urge:

First: That the order of the trial Court overruling the special demurrers to the indictment for duplicity be reversed, and the cause remanded with directions to sustain the special demurrers.

Second: That, in the event the indictment is sustained, then, because of the insufficiency of the evidence to prove, beyond a reasonable doubt, that these defendants mailed the indictment letters, and the consequent error of the trial Court in refusing

to direct the verdicts for these defendants, that the judgments be reversed with directions to dismiss the cause (Vol. 2, R. C. L. p. 282, Sec. 237).

Third: That, in the alternative, the judgments be reversed with directions to grant a retrial.

Respectfully submitted,

LESLIE C. HARDY,

Attorney for Appellants, Jesse H. Shreve and Archie C. Shreve

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On the Brief.

APPENDIX

DEFENDANTS' OFFER OF PROOF

Defendants' offer of proof, which was filed with the Clerk, after the trial court had refused to permit the offer to be made, is as follows:

> We now offer to prove by this witness that a conversation took place at San Diego, California, during the summer or fall of 1931, at San Diego, California, between Jesse H. Shreve, Glen O. Perkins, John C. Hobbs and this witness A. C. Shreve, at which time substantially the following conversation was had:
>
> Mr. Perkins stated that Security B & L was having heavy demands for withdrawals by its depositors and that the association was unable to meet the demands; that it would be necessary for them to borrow $50,000; that he wanted to make arrangements in San Diego or somewhere to borrow $50,000 for and on behalf of the Security B & L., Century Investment Trust and Arizona Holding Corp. Jesse H. Shreve stated that he was in no position to make the loan, that he could not arrange such loan and did not know of any place where such loan could be obtained. Mr. Perkins then stated that he would like to have some advice as to what course the building and loan assn. could follow. A. C. Shreve stated that unless they could meet the demands for withdrawals or arrange for a loan to meet them, or

make some satisfactory arrangements that it was his opinion that they would be placed in the hands of a receiver. Mr. Hobbs and Mr. Perkins stated that they believed they could make the necessary arrangements somewhere else, if we were unable to assist them, and keep the business going and finally meet the demand. At that conversation A. C. Shreve asked if their minutes and books of the meetings of Security B & L, Ariz. Hold. Corp. and C. I. T. were up to date, to which Mr. Perkins and Mr. Hobbs both replied that the books of both offices were up to date; they also stated that the minutes of meetings of the officers and directors were up to date, as they had been kept from the beginning of each Company (R. 791, 792).

* * * *

Defendants offer to prove by this witness that a conversation took place between Jesse H. Shreve, Glen O. Perkins and this witness, being the only persons present, held early in December, 1929, in the office of the Security Building and Loan Assn. and Century Investment Trust on the ground floor of the Adams Hotel Building, on Central Avenue in Phoenix, Arizona, substantially as follows:

Jesse H. Shreve stated that he was going to withdraw from further participation in any management, control and operation of the Security Building and Loan Assn., Century Investment Trust and Arizona Holding Company; that he would give a reasonable time, but not to exceed two or three months, so that someone else could

take his place. Glen O. Perkins stated that he was sorry but that he would make arrangements for someone to take over the interests of Jesse H. Shreve and Archie C. Shreve in those corporations; that he would arrange to relieve Jesse H. Shreve and Archie C. Shreve of all further liability for the operation, management and control of the three companies; that he would be able to make this arrangement within not to exceed ninety days. Jesse H. Shreve thereupon stated that he thought that the deals pending for the exchange of stock of Century Investment Trust for stock of other corporations, particularly those represented in San Diego, California, should be rescinded. Mr. Perkins replied that such arrangement would be agreeable to him and that he would work the matter out. Mr. Perkins requested that A. C. Shreve assist him from time to time for two or three months in connection with the affairs of the three corporations. A. C. Shreve stated that he would give some of his time to the business, that part of his time would have to be devoted to the affairs of the Overland Hotel and Investment Company in connection with the Santa Rita Hotel at Tucson, Arizona, and that part of his time would be required in connection with his employment and business at San Diego, California (R. 792, 793).

* * * *

We offer to prove by this witness that a conversation took place between Daniel H. Shreve, Jesse H. Shreve, Glen O. Perkins, and this witness some time during the month of February, 1930, at San Diego, California, at which conver-

sation no one else was present, which conversation was substantially as follows:

Daniel H. Shreve stated that he had been to Phoenix, Arizona, and looked into the affairs of the Security Bldg. & Loan Assn., Century Investment Trust and Arizona Holding Corporation; that he had concluded to purchase and take over all of the interest of J. H. Shreve and A. C. Shreve in those companies; that he in conjunction with Glen O. Perkins and Mr. Hobbs would assume complete responsibility for the operation, management and control. Mr. Perkins stated that such arrangement was satisfactory and agreeable to him. J. H. Shreve and A. C. Shreve stated that they had discussed the matter with them and that they had transferred and delivered to Daniel H. Shreve all of their stock in said corporation (R. 793, 794).

* * * *

We now offer to prove that there was a conversation held between Glen O. Perkins, A. C. Shreve and Jesse H. Shreve early in 1930, at the office of the Security Building and Loan Assn., Adams Hotel Bldg., Phoenix, Arizona, at which time substantially the following conversation took place:

Mr. Perkins presented a printed circular bearing a printed signature purporting to be a facsimile signature of J. H. Shreve, and stated that that circular had been written and had been printed by certain salesmen working under he, Mr. Perkins. J. H. Shreve thereupon stated that

the circular must not be circulated or distributed, that is was wholly without his authority, that he did not and would not approve of it, that he had not authorized it, and would not permit it to be criculated. J. H. Shreve further stated that he had no connection with the operation, management or control of the company and did not want his name to be used in conection with it; that he had formerly withdrawn from further participation in the affairs of the company, except in a nominal capacity, awaiting Mr. Perkins' promise to replace him on the board of directors and as an officer of the companies, and that he was expecting him to carry out the promise which he had made in December, 1929 (R.797, 798).

SUBDIVISION (c), RULE 43 OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, ADOPTED BY THE SUPREME COURT OF THE UNITED STATES.

Rule 43 (EVIDENCE) (c) RECORD OF EXCLUDED EVIDENCE. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examing attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the

same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

ASSIGNMENT OF ERROR

XXV

The Court erred in admitting in evidence Government's Exhibit 207, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: We object, because it appears to be addressed to Manuel K. King, and for the further reason it is a printed pamphlet. The true name of J. H. Shreve does not appear on here as President of the Century Investment Trust, but it is in sterotype form; it is not the original signature.

MR. PETERSON: Identified by the witness as being a facsimile signature.

MR. HARDY: Very well, that does not make it an original signature, and the absence of some proof that J. H. Shreve, the defendant here, knew that this circular was mailed, or caused it to be mailed; the mere fact that a fac-simile signature appears on there, we don't think is sufficient to entitle it to be admitted in evidence. It is hearsay. It is incompetent as to him.

THE COURT: It may be received.

MR. HARDY: And another objection; the mere fact that Mr. King took it from the post-office is no proof it was mailed to him. There has not been any proof it was mailed to him, and in addition, it appears on the face of it that it is not addressed to this witness.

THE COURT: It may be received.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: An invitation of the Board of Directors of Century Investment Trust, extended at the request of J. H. Shreve to Manuel "K." King, disclosing J. H. Shreve as President, San Diego, California, and mentioning A. C. Shreve, Phoenix, Arizona, Vice-President and Director and Officer of several financial institutions of Arizona and California. The exhibit recites, among other things, that Century Investment Trust owns entirely, others in which it owns control, and others in which it has a stock ownership, Security Building and Loan Association, First National Bank of Prescott, Arizona, Citizens State Bank, Phoenix, Arizona, Arizona Holding Corporation, Phoenix, Arizona, Sunset Building and Loan Association, San Diego, California, Commonwealth Building Company, San Diego, California, United States National Bank, San Diego, California, First National Bank, Oceanside, California, Southwest Union Securities Corporation, San Diego, California. The pamphlet or circular further states that the present stock offering of Century Investment Trust is to provide funds with which to purchase under the present most favorable conditions, additional banking institutions, building and loan companies, seasoned securities which have a

long period of successful record, and every form of profitable investment offering, to the end that Century Investment Trust may be known as a giant financial institution not only of "Arizona for Arizona" but of the "West for the West." It further recites that Century Investment Trust is a prosperous, healthy and growing corporation. It invites the addressee in the name of the Company and Board of Directors to join the Company before the very early advance in the price of stock of Century Investment Trust. (R. 943).

SECTIONS 661 and 688, TITLE 28, USCA.

Section 661. COPIES OF DEPARTMENT RECORDS AND PAPERS; ADMISSIBILITY. Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. (R. S. Sec. 882).

Section 688. PROOFS OF RECORDS IN OFFICES NOT PERTAINING TO COURTS. All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court

of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken. (R. S. Sec. 906).

SECTION 4458, REVISED CODE OF ARIZONA, 1928. Certified copies, under the hands and official seals, if there be seals, by all state and county officers of all documents properly on file with such officers, shall be received in evidence as the originals might be received. Every written instrument, except promissory notes, bills of exchange, and the last wills of deceased persons, may be acknowledged as deeds are required to be acknowledged, and when so acknowledged shall be received in evidence without other proof of execution. (1745-6 R. S. '13, cons. & rev.)

PROCLAMATION DECLARING ARIZONA ADMITTED AS A STATE

By The President of the United States of America.

A Proclamation.

February 14, 1912.

WHEREAS, the Congress of the United States did by an Act approved on the twentieth day of June, one thousand nine hundred and ten, authorize the people of the Territory of Arizona to form a Constitution and State government, and provide for the admission of such State into the Union on an equal footing with the original States upon certain conditions in said Act specified; and

WHEREAS, said people did adopt a Constitution and ask admission into the Union;

NOW, WHEREAS, the Congress of the United States did pass a joint resolution, which was approved on the twenty-first doy af August, one thousand nine hundred and eleven, for the admission of the State of Arizona into the Union, which resolution required that, as a condition precedent to the admission of said State, the electors of Arizona should, at the time of the holding of the State election as recited in said resolution, vote upon and ratify and adopt an amendment to Section One of Article VIII of their State Constitution, which amendment was

proposed and set forth at length in said resolution of Congress.

AND WHEREAS, it appears from information laid before me that the first general State election was held on the twelfth day of December, one thousand nine hundred and eleven, and that the returns of said election upon said amendment were made and canvassed as in section seven of said resolution of Congress provided;

AND WHEREAS, it further appears from information laid before me that a majority of the legal votes cast at said election upon said amendment were in favor thereof, and that the governor of said Territory has by proclamation declared the said amendment at part of the Constitution of the proposed State of Arizona;

AND WHEREAS, the governor of Arizona has certified to me the result of said election upon said amendment and of the said general election;

AND WHEREAS, the conditions imposed by the said Act of Congress approved on the twentieth day of June, one thousand nine hundred and ten, and by the said joint resolution of Congress have been fully complied with;

NOW THEREFORE, I, WILLIAM HOWARD TAFT, President of the United States of America, do, in accordance with the provisions of the Act of Congress and the joint resolution of Congress herein named, declare and proclaim the fact that the fundamental conditions imposed

by Congress on the State of Arizona to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fourteenth day of February, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States of America the one hundred and thirty-sixth.

(Seal) WM. H. TAFT.

By the President:

HUNTINGTON WILSON,
Acting Secretary of State.

XX

The Court erred in admitting in evidence Government's Exhibit 71, which was received in evidence over the following objection and exception by counsel for defendants:

"MR. HARDY: Now, your Honor, we object to the receipt of the books in evidence identified as Government's Exhibit Nos. 71, 72, 73, 74, 75,

77 and 78, for the reason that it appears from the testimony of the witnesses for the Government that the books and records embraced by those exhibits marked for identification are not books and records of original entry, and that they are not the first permanent transaction, and that these books and records reflect entries which are transcribed from other tickets, documents or memoranda. For the further reason that the books and records as to the defendants an trial are hearsay. They are secondary evidence and not the best evidence of the transactions indicated by the books. And for the further reason it has not been shown that the defendants on trial either directed, supervised or caused any of the entries in those books to be made.

THE COURT: Overrule the objection.

MR. HARDY: Exception."

The full substance of said exhibit is as follows: General Ledger Security Building and Loan Association, subdivided and marked Assets, Liabilities, Capital, Income, Expense—Tucson Assets, Liabilities, Revenues, Expenses. First item under Assets dated Nov. 23, 1929, account secured by loans on real estate, setting forth various accounts to various persons, including W. H. Perry, A. W. York, Loan No. 37, Shumway Loans Nos. 36 and 44, Rayburn Loans Nos. 26 and 27, York Loan No. 19, Dreyfus Loan No. 41, Arrington Loans Nos. 39 and 42. Also sets forth loans secured by stock of Association; loans secured by United States and Arizona bonds; Investment Certificates of Association and banks; Furniture and Fixtures; Supplies—inventory; Prepaid in-

surance; Items in process of Collection; Cash on hand, first item dated Nov. 22, 1929; account with Commercial National Bank, Phoenix, Arizona; account with Arizona Bank; Citizens State Bank; First National Bank of Prescott; The Valley Bank, Mesa; Bank of Chandler; Mesa Agency, Globe Agency; Sunset Building and Loan Association, San Diego, California, pass book No. 3756, first entry Nov. 22, 1929; Century Investment Trust, first entry Nov. 22, 1929; Century Investment Trust insurance account; Century Investment Trust clock account. Liabilities: Loans secured by real estate repaid, first entry March 31, 1930; Investment Certificate passbook shares, first entry Nov. 22, 1929; Installment Investment Certificates Class D, first entry May 10, 1930; Installment Investment Certificates Class E, first entry March 25, 1930; Installment Investment Certificates Class F, first entry April 10, 1930; Income Certificates, first entry March 1, 1930; Full Paid Investment Coupon Certificates Full Paid Investment Non-Coupon Certificates; entries of Tucson office Security Building and Loan Association; Notes Payable, Notes Payable to Banks, Loans Real Estate Incomplete, first entry Nov. 22, 1929, disclosing various loans to various parties including Shumway loan No. 38, Arrington Loan No. 39, York Loans Nos. 19 and 37, Rayburn Loans Nos. 26 and 27, Dreyfus Loan No. 41, and Arrington Loan No. 42; Cash, first entry Jan. 19, 1930; Escrow Account; Capital; Undivided Profits Dec. 31, 1930, $3,176.13 (red), Undivided Profits Dec. 31, 1931, $3,040.16, Profit and Loss Dec. 31, 1930, $3,363.28 (red); Reserve Jan. 31, 1931, $135.97 (red); Profit and Loss Dec. 12, 1930, $187.15; Income, interest on loans, first item Jan. 2, 1930; Interest other than loans, first item Dec. 31, 1930; Profit and Loss Dec. 31, 1930, $1,-

392.30 (red); Interest investments, real estate loans, first item Jan. 29, 1931; Fees and commissions, first item Dec. 31, 1929; fees on loans, first item Jan 31, 1931; Fees other than loans, first item May 31, 1930; Expenses: salaries of officers, first entry Dec. 31, 1930; Legal fees and salaries, first item Jan. 24, 1930; Salaries employees, first item Jan. 22, 1931; Various items including accounting and auditing fees, agents commissions, rents, advertising and publicity ,taxes and licenses, interest on notes payable, interest on full-paid investment certificates, interest on full-paid investment coupon certificates, interest on full-paid interest non-coupon certificates, interest on investment certificates pass-book, interest on monthly income certificates, telephone and telegraph, sundry supplies and expenses, insurance, postage and stamped envelopes. Revenues, Expenses, title expense, donations, flowers and trimming expense, automobile expense, travel expense, prepaid insurance, accrued interest, Sundry supplies and expense, with notation "Items on this sheet transferred to detail sheets on June 13, 1930, E. F. Y." Interest on loans, interest on investments, fees on loans, other fees, salaries other than officers, control account, salaries other employees, control account, agents commissions and salaries, control account, legal fees and salaries, control account, auditors fees, control account, rent, control account, advertising and publicity, control account, taxes and licenses, control account, income discounts, control account, interest on notes payable, control account, interest on full-paid certificates, control account, interest an pass-book accounts, control account, interest paid on deposits, control account, sundry interest paid, control account, printing and stationery, control account, telephone and telegraph, control account, sundry supplies and

expenses, control account, new accounts expense, control account, insurance, control account, postage and stamped envelopes, control account, revenue stamps, control account, title expense, control account, donations, control account, flowers and trimmings, control account, automobile expense, control account, travel expense, control account, bank service expense, cash short, control account, interest on full-paid investment certificates non-coupon, control account, expense account, Mesa Agency, control account, Arizona Bank control account, Expenses Advances, control account, Prepaid insurance control account, accrued interest receivable control account, escrow account control account. Tucson office: Assets: Loans, first entry April 19, 1929; loans secured by stock in Association, first entry 6-26-30. Investment Certificates other building and loan associations, furniture and fixtures, cash account, first entry March 8, 1929; Arizona-Southwest Bank, first entry March 22, 1929; Commercial National Bank, first entry April 6, 1929; Consolidated National Bank, first entry June 1, 1929; Old Dominion Bank, first entry May 15, 1930; Phoenix office Security Building and Loan Association, first entry Nov. 23, 1929; Bisbee Agency, first entry Dec. 30, 1930; Sunset Building and Loan Association, first entry May 1, 1930; Principal and interest (Overland Hotel mortgage) $30,860.43; United States and Arizona bonds owned, State Treas. March 8, 1929, $50,000.00; Certificates of Account, first entry March 8, 1929; First National Bank of Prescott, 5 entries of $10,000 each, same date; to State Treasurer $50,000. Items in process of collection. Liabilities: Investment Certificates Account pass-book, first entry 3-8-29; monthly income investment certificates, first entry 9-30-29; full-paid investment certificates, first en-

try 1-3-29; Installment Investment Certificates Class A, first entry 4-4-29; Installment Investment Certificates Class B, first entry 1-3-30; Installment Investment Certificates Class C. first entry 1-3-30; Installment Investment Certificates Class D, first entry 3-28-30; Installment Investment Certificates Class E, first entry 3-28-30; Installment Investment Certificates Class F, first entry 3-9-30; Full Paid Investment Certificates, first entry 10-31-30; Interest paid to Banks, first entry 6-25-30; Incomplete Loans, first entry 7-18-30; Capital Stock Account, first entry 3-8-30; Undivided Profits Account, Capital Stock Account, Capital Surplus, Undivided Profits, first entry 12-31-30, $455.70; Profit and Loss Account, first entry 6-2-29; balance $1,513.65, Profit and Loss Account, 12-31-30, Balance $456.70; Real Estate loan repaid, first entry 5-1-30; Revenues: Interest received account loans, first entry 1-4-30; fees on loans, first entry 1-3-30; interest on investments other than loans; first entry July 3, 1930; interest on Sunset Building and Loan certificates, balance $308.00; other fees, first entry 1-6-30; Expense account, first entry 4-13-29; Salaries other Officers, first entry 6-9-30; Salaries other employees, first entry 6-6-30; Agents commissions and salaries, first entry Nov. 10, 1930; Auditing and accounting, first entry 6-14-30; rent, first entry 7-14-30; Advertising and Publicity, first entry 6-9-30; Fees and Licenses, first entry 6-10-30; Interest on notes payable, first entry 6-25-30; interest paid account—full paid certificates, first entry 6-3-30; interest paid account pass book certificates, first entry 1-3-30; interest paid account pass book certificates, first entry 6-3-31; interest other deposits, first entry August 24, 1931; sundry interest paid, first entry August 15, 1930, printing and stationery, first en-

try 6-9-30; telephone and telegraph, first entry May 7, 1930; sundry supplies and expenses, first entry 1-7-30; new account expense, first entry 1-14-30; insurance, first entry 5-20-30; postage and stamped envelopes, first entry 1-29-30; title expense, first entry Jan. 20, 1930; donations, first entry March 24, 1930; dues and subscriptions, first entry Dec. 3, 1930; flowers and trimming account, first entry Dec. 31, 1931; travel expense, first entry 7-15-30; automobile expense, first entry 7-10-30; cash short, first entry 1-20-31; interest on full paid investment non-coupon certificates, first entry Nov. 1, 1930. (R. 932).

SECTIONS 695 AND 695h, TITLE 28, USCA.

Sec. 695. ADMISSIBILITY. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memodandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility.

The term "business" shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, pp 1, 49 Stat. 1561).

Sec. 695h. PROSPECTIVE NATURE OF SUBCHAPTER. Sections 695 to 695h of this title shall be prospective only, and not retroactive. (June 20, 1936, c. 640, pp 9, 49 Stat. 1564).

TESTIMONY OF GOVERNMENT'S WITNESS WATT ON CROSS EXAMINATION, WITH REFERENCE TO ASSIGNMENTS OF ERROR XVIII, XIX AND XX, RELATING TO ADMISSIBILITY OF BOOKS AND RECORDS OF ARIZONA HOLDING CORPORATION, CENTURY INVESTMENT TRUST AND SECURITY BUILDING AND LOAN ASSOCIATION. (R. 344 to 354).

"I have identified Government's Exhibit 61 as the general ledger of the Century Investment Trust. Ordinarily I kept it. I can not say that there are not some entries in here made by someone else without a complete inspection of it. (The witness inspected the book.) That is all entirely in my handwriting. It is not the first book of entry recording these transactions; that is a general ledger of the Century Investment Trust. I worked on those books during June of 1930. The entry dated October 30, 1929, was made before I went to work for the corporation. I made that entry.

Q. From what information did you make that entry?

A. Well, I rewrote the books of the Century Investment Trust from whatever information I could get the necessary information from—from whatever source, I should say.

Q. You rewrote all of the books of the Century Investment Trust?

A. Not entirely, no.

The witness continuing: The three books, or parts of them, which I rewrote, are Government's Exhibit 63 for identification, which is the journal voucher of Century Investment Trust, Government's Exhibit 62 for identification, which is a book marked "Century Investment Trust," and Government's Exhibit 61 for identification, which is marked "General Ledger Century Investment Trust."

Q. And at whose direction did you rewrite those books?

A. D. H. Shreve.

Q. You mean Daniel H. Shreve?

A. Yes, sir.

Q. And what information did you have, or what records did you have from which you rewrote those books?

A. Had the old books, deposits in the Security Building and Loan, and the bank deposit slips. I believe, and check stubs, cancelled checks and

what other—what information I could get from Mr. Shreve regarding certain transactions which were not clear of themselves.

Q. When you say "Mr. Shreve" you mean Daniel H. Shreve?

A. Yes, sir, as I previously testified.

The witness continuing: To a great extent I relied upon information I found myself in order to rewrite these books. I do not know where the books and records are from which I rewrote these books. I know what I did with them after I completed rewriting the books. The old pages were put there in the office in one of the files, and I don't know whatever happened to them.

Q. Well, then, these books which have now testified about are not books of original entry?

A. Well, I think that is asking for an opinion on my part.

Q. Well, they were not originally—they were not made by you from information that came to you direct; they were made from information made by someone else, were they not, or records or entries made by someone else?

A. Yes, sir.

Q. Did you make the original entries from which these books were rewritten?

A. Do you mean like check-stubs or deposit slips?

Q. From whatever source you got this information, did you make the original entries?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Do you know who made them?

A. I don't know.

Q. Well, now, did you copy some of those books in Exhibits 63 and 61 and 62 from other books?

A. From the other books.

Q. From other books?

A. Yes, sir. Some of the entries probably are the same as they were in the old book, but there were many transactions that were not recorded or were not recorded properly in the old books.

Q. And those which you thought were improperly recorded in the old books you recorded, made new entries of those in these books?

A. Yes, sir.

Q. And that you did on your own responsibility?

A. No, sir.

Q. At whose direction?

A. Daniel H. Shreve.

Q. Daniel H. Shreve?

A. Yes, sir.

Q. Did either J. H. Shreve or A. C. Shreve ever request you or counsel with you in the rewriting of those books?

A. Not that I recall.

Q. And the information which you got to rewrite these books, you don't know whether it was correct or not, do you, Mr. Watt?

A. No, I have no way of knowing of my own personal knowledge.

Q. You were just taking what somebody else had said?

A. I believed it to be correct.

Q. You merely believed it to be correct?

A. Yes, sir.

The witness continuing: I did not rewrite

any books of the Security Building and Loan Association, except trace entries in the Building and Loan books which pertained to the Century Investment Trust or the Arizona Holding Corporation. I traced them from the rewritten books of the Century Investment Trust. I did not rewrite any books of the Arizona Holding Corporation. This was in June, 1930. I am referring to. There had been no entries made in the books of the Arizona Holding Corporation since November 4th or 5th, 1929. I opened a set of books and brought those up to date.

Q. Where did you get the information from which you brought those books up to date?

A. From the same sources I got the other information: Deposit slips and check stubs, cancelled checks, deposits in the Building and Loan.

Q. And those were records and documents made by someone else?

A. Yes, sir.

Q. And you don't know whether they were correct or not?

A. Not of my own knowledge.

Q. Yes. And who directed you to make those entries about which you have testified in the Arizona Holding Company books?

A. D. H. Shreve.

Q. You mean Daniel H. Shreve?

A. Yes, sir.

Q. Did J. H. Shreve or A. C. Shreve give you any directions with respect to those books?

A. Not that I recall.

The witness continuing: I can select the books of the Arizona Holding Company with respect to which I made those entries. I refer to Government's Exhibit 70, 69, 68, 65, 66 and 67 for identification. Some entries in exhibits numbered 69 and 70 of the Arizona Holding Company are reflected from the rewritten books of the Century Investment Trust, because there were some transactions that ran through the three compaies; had to give them proper effect in the books of these two corporations. These rewritten entries in the Century Investment Trust had a bearing thereafter upon the books of the Security Building and Loan Association; they had a bearing before that time, if I understand your question correctly. It was not necessary to make any changes in the books of the Security Building and Loan Association because of the rewriting of the books of the Century Investment Trust. I did not rewrite any of the books of the Security Building and Loan Association.

Government's Exhibits 61 and 68 for identification, inclusive, are books and records of the Century Investment Trust. Those books and records contain entries of transactions which happened after October 24, 1931. I think that is

true. They do with the possible exception of the insurance accounts receivable and the policy register is not here. I can't answer that definitely without inspecting the entries. They all contain entries subsequent to October 24, 1931. Government's Exhibits 67 and 70 for identification contain entries of transactions which happened after October 24, 1931. They contain a number of such entries. Some entries in Government's Exhibits 61 to 70 for identification, inclusive, are not made by me. Some of them were made by Miss E. F. Young. I think Mrs. Harrington and Miss Harrison may have. Miss Goudy wrote insurance policies and the copy of the bill which was filed here in the insurance accounts receivable, whether it was made out by her on the typewriter at the time— not in her handwriting. They were made out by her on the typewriter and that record was transferred into this books, being Government's Exhibit 64 for identification. I probably inserted those records myself. Other than that I did not make the entries which went into the book. I would say, offhand, there are about four handwriting altogether in those books, including myself. I can identify some of this handwriting. Miss Young and I made entries in these books and one or two of the entries are in a handwriting I am not familiar with. I know it is neither the handwriting of Miss Young or myself. There are two handwritings in these books with which I am not familiar. That applies only to the books of the Century Investment Trust. I believe the books of the Arizona Holding Corporation, Government's Exhibits 69 and 70 for identification, are entirely in my own handwriting, with the exception of one five dollar

credit which I mentioned the other day, an account of James Gammell, and some pencil notations which do not affect the balance. I do not know who made the item which is not in my handwriting. Some of the entries of transactions in the books identified as Government's Exhibits 61 to 70 inclusive were of transactions which occurred prior to the time I went to work for the Century Investment Trust or the Arizona Holding Corporation. The first date of such transaction set up in the books of the Century Investment Trust is October 30, 1929, and I was not working for the Century Investment Trust at that time, but I made that entry in Government's Exhibit 63 for identification. I presume I got that information from the Articles of Incorporation. That was made setting up the capital stock, and states so on the voucher. Referring to Government's Exhibit 62 for identification, which is a book of the Century Investment Trust, and to the page under the subdivision of the Commercial National Bank, No. 102-1, the dates of those transactions are November 20th and on down to December 5th, 1929. I was not connected with the Century Investment Trust at that time. I knew nothing about these transactions except from information I could gather from original sources or from any other information. Mr. Dan Shreve knew about some items. I don't know that he did back this far but the check stubs in most cases would indicate what the charge was to be on the item.

Q. The items appearing on that page which were made by you are not the original entries of those transactions?

A. No, I presume they were not.

Q. They were transcribed by you into that record from other entries, or documents, or records?

A. Yes, sir.

Q. Or from informtion which you gathered from place to place?

A. Yes, sir.

The witness continuing: Those are original entries in the books of the Arizona Holding Corporation, being Government's Exhibits 69 and 70 for identification. There have not been any bookkeeping entries made from about November 4th or 5th, 1929, until about June, 1930. Some of those entries in those Arizona Holding Corporation books were based upon or made from entries which then existed in the books of the Century Investment Trust. At the time I became associated with the Arizona Holding Corporation no entries had been made in those books of that corporation for several months prior thereto.

Q. And what did you do with those books?

A. I brought them up to date.

A. From the original sources of information wherever I could find it, deposit slips, depositors in the Building and Loan, check stubs.

Q. Were those deposit slips, check stubs and other data made by you?

A. No, sir.

Q. Made by someone else?

A. Yes, sir.

Q. By whom?

A. I could not answer that now. (R. 344 to 352).

* * * *

RE-DIRECT EXAMINATION

MR. PETERSON: Q. Mr. Watt, in making the entries in the exhibits of the Century Investment Trust and the Arizona Holding Company, were those entries made from the original sources the same as if all the entries had been made when the transactions occurred, and in the regular course of business?

MR. HARDY: Well, your Honor, we object to that, because it calls for a conclusion of the witness and because he has already testified from what sources the entries were made.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: They were made in that way, yes, sir." (R. 354).

EVIDENCE OF MAILING INDICTMENT LETTERS

COUNT ONE—Letter addressed to Fred Sweetland. With respect to this letter Government's witness Hobbs testified:

"That is my signature on Government's Exhibit 159 for identification.

Q. Was that letter mailed in the regular course of business of the Security Building and Loan Association?

MR. HARDY: We object to that, your Honor, it is incompetent, irrelevant and immaterial, in the regular course of business, and leading.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: Yes, this letter was mailed in the regular course of business.

The witness continuing: Government's Exhibit 159 for identification is signed by me as Vice-President and Secretary of the Building and Loan Association. I don't know that I actually mailed the letter myself. Someone in the office mailed it. I don't recall the details. It is a form letter. I am not certain that the form was prepared or attached by me. The letter apparently was dictated by me to Mrs. Fricke and signed by me. *I could not say as to J. H. Shreve or Archie Shreve assisting in the preparation or*

the mailing of the letter. Sometimes these form letters came to us in a box or group and we simply mailed them out from Tucson. Sometimes we copied the letter, the letter that was sent us, and mailed them out from there. It would indicate I dictated this letter myself." (R. 573, 574).

COUNT TWO—Letter addressed to O. Hohenstein. With respect to this letter Government's witnessWatt testified:

"I signed the slip enclosure in the envelope marked Government's Exhibit 161 for identification. That enclosure was mailed in that envelope in the general course of business of the Security Building and Loan Association.

MR. HARDY: We object to that, your Honor. There is not sufficient proof of the mailing.

THE COURT: Well, he may answer.

THE WITNESS: Yes, sir; it was.

The witness continuing: I recall making that slip myself, and that is my signature upon it.

MR. PETERSON: We offer Government's Exhibit 161 in evidence.

MR. HARDY: (On voir dire examination) Government's Exhibit 161 for identification is a duplicate slip. It is all in my handwriting. I do not know that I addressed the envelope. It is typewritten, I could not tell. *Neither of these defendants had anything to do directly with the*

preparation or mailing of Exhibit 161 for identification. This is the ordinary form of deposit slip which was mailed out to depositors of the Security Building & Loan Association." (R. 603).

COUNT THREE—Letter addressed to Henry Baker. With respect to this letter Government's witness Shumway testified:

"MR. PETERSON: I will hand you Government's Exhibit 166, being an envelope, and 167 for identification, particularly calling your attention to Government's Exhibit 167, being the letter, and ask you if *any letters of that type were mailed from the Mesa office?*

MR. HARDY: We object to that, your Honor. It calls for a conclusion of the witness when he asked if letters of that type were bing mailed out of the Mesa office.

THE COURT: He may answer.

MR. HARDY: Exception.

THE WITNESS: Yes, sir.

The witness continuing: Those letters were mailed in the regular course of business from the office of the Security Building and Loan Association." (R. 719, 720).

COUNT FOUR—Letter addressed to Wesley Palmer. With respect to this letter Government's witness Perkins testified:

"The letters which are Government's Exhibits 161 and 162 for identification, were mailed out in the regular course of business. *It was the custom to mail those dividend letters out.*

MR. PETERSON: I offer in evidence Government's Exhibit 161 and 162 for identification, which is the letter testified to by Mr. Wesley Palmer, that he received this through the United States Mail.

MR. HARDY: Object to its receipt in evidence—their receipt in evidence upon the ground no proper foundation has been laid for its admission.

THE COURT: It may be received.

MR. HARDY: Exception.

MR. FLYNN: Just a minute, I think we have got the wrong numbers on that exhibit.

THE CLERK: This exhibit you offered is 162 and 163?

MR. PETERSON: I ask an order that that be changed.

THE CLERK: Exhibits should be 162 and 163 instead of 161 and 162." (R. 624, 625).

COUNT FIVE—Letter addressed to R. R. Guthrie. With respect to this letter Government's witness Hobbs testified:

"Q. (Mr. Peterson): I hand you Government's Exhibit for identification 164 *and ask you what the custom in mailing out those letters was,* and if you recognize the signature on that letter?

MR. HARDY: Just a moment, we would like to see the exhibit before he answers. With reference to this Government's Exhibit 164 for identification, Mr. Peterson, you are now asking Mr. Hobbs what the custom was in regard to mailing it out?

MR. PETERSON: Yes, sir; mailing letters of that type out.

MR. HARDY: We object, first, because the letter is not in evidence, therefore, no testimony with respect to a custom concerning the letter is now admissible, and the additional reason that a custom is irrelevant, incompetent and immaterial.

THE COURT: He may answer.

MR. HARDY: Exception.

The witness continuing: In the case of these dividend letters, I think they were generally prepared in the Phoenix office and mailed to us in a batch, and we addressed them to the proper people and mailed them out to our stockholders in Tucson. Sometimes those letters were signed when they left Phoenix, sometimes I signed them down there. I recognize the signature upon the exhibit I hold in my hand. It is the signature of D. H. Shreve. I don't recall Mr. Shreve signing those letters in the Tucson office.

Q. *Was it the custom* to receive those letters signed by Mr. Shreve in Phoenix and then mailed out of your office?

MR. HARDY: We object to the question, as to the custom. It is irrelevant, immaterial and no foundation has been laid for the custom.

THE COURT: He may answer.

MR. HARDY: Exception.

The witness continuing: Stockholders' letters were mailed from Phoenix and were usually signed in Phoenix and we simply addressed the envelopes in the Tucson office and put them in the mail there. Government's Exhibit 164 for identification, which I hold in my hand, is the class of letters I have just testfied in regard to." (R. 577, 578).

COUNT SIX—Letter addressed to O. H. Robson and Mary Robson. With respect to this letter Government's witness Perkins testified:

"That is my signature upon form letter being Government's Exhibit 165 for identification.

Q. *Was that mailed out in the general course of the business of the Century Investment Trust?*

A. We mailed out—yes, sir; those letters were mailed out, yes, sir.

MR. PETERSON: I offer Government's Exhibit 165 for identification in evidence, being a

letter which Mr. O. H. Robson testified he received through the United States mail.

MR. HARDY: Government's Exhibit 165 for identification, your Honor, purports on the face of it is addressed to O. H. Robson and Mary Robson. It is the position of the defendants that there isn't sufficient proof as yet to show that those were received through the mails by either of those persons. There is no positive testimony from Robson in that respect, and Mary Robson, another addressee in the letter, has not testified. There is no proper foundation laid yet.

THE COURT: It would not have to be received if it were deposited in the mail, would it?

MR. HARDY: Well, I should think the letter would have to be received, yes.

THE COURT: It may be received." (R. 623, 625).

COUNT SEVEN—Letter addressed to Helen Hannon. With respect to this letter Government's witness Perkins testified:

"The letter which is Government's Exhibit 173 for identification was a form letter *mailed out in the regular course of business.*

MR. PETERSON: I offer at this time Government's Exhibit 173 for identification, being a letter testified to by Mrs. Helen Hannon as having been received through the United States Mail —Helen Maynard.

MR. HARDY: Object to the receipt of Government's Exhibit 173 in evidence, upon the grounds no proper foundation has been laid for its admission.

THE COURT: It may be received.

MR. HARDY: Exception." (R. 626, 627).

COUNT EIGHT—Letter addressed to Harry Nelson and Anna B. Nelson. (Exhibit 168 and 169, R. 583, 584). With respect to this letter Government's witness Hobbs testified:

"Government's Exhibit 179 for identification is the same type of letter, is one of the dividend letters which I testified in regard to. D. H. Shreve's signature is on that letter. Government's Exhibit 181 for identification, being a letter, and 182, *is one of the type of form letter I have testifed in regard to.* Government's Exhibit 183 for identification, being a letter, and 184, being an envelope, is the type of dividend letters which I have testified in regard ot.

THE CLERK: You have 182, which was just marked for identification, is the same as 169 which has been heretofore marked for identification, and 184 which was just marked for identification is the same as 168 which has heretofore been marked for identification. 183 and 184 will not be assigned as any more exhibits. There was some testimony about 183 and 184, so we can't assign those numbers to any other exhibits." (R. 578, 579).

COUNT NINE—Letter addressed to Alice H. Davis. With respect to this letter Government's witness Perkins testified:

> "I recognize my signature upon the letter and envelope being Government's Exhibits 205 and 206 for identification. *That letter was mailed in the regular course of business* of the Security Building and Loan Association. I remember dictating the letter to the secretary; I signed it and told her to mail it." (R. 652).

COUNT TEN—Letter addressed to Lulu Gatlin. (Exhibits 179, 180, 181, R. 709, 710). With respect to this letter Government's witness Hobbs testified:

> "Government's Exhibit 179 for identification is the *same type of letter*, is one of the dividend letters which I testified in regard to. D. H. Shreve's signature is on that letter. Government's Exhibit 181 for identification, being a letter, and 182, is one of the type of form letters I have testified in regard to." (R. 578, 579).

COUNT ELEVEN—Letter addressed to Lulu Gatlin. (Testimony with regard to the letter set forth in this count is the same as testimony in Count Ten, supra.

In addition to the foregoing, Government's witness Hobbs, on cross examination ,testified as follows:

> *"I know that D. H. Shreve came over the early part of 1930 and took over the conduct of the Security Building & Loan Association, and*

also the other two companies, Arizona Holding Corporation and Century Investment Trust, and from that time on the business affairs of those corporations were discussed and transacted in the main between me and D. H. Shreve. As far as I was concerned D. H. Shreve became the active head of the business when he came over in the early part of the spring of 1930. As far as I was concerned I was in charge of the affairs and the business of the Tucson office, and I took my instructions thenceforth from D. H. Shreve. Government's Exhibit 164 for identification is signed by D. H. Shreve, meaning Daniel H. Shreve. That is D. H. Shreve's signature on that letter. It is a form for mimeographed letter. *It was the custom for Dan Shreve to send form letters from the Phoenix office for mailing from the Tucson office.* I do not know who actually mailed this letter which is marked Government's Exhibit 164 for identification. It was just mailed in the ordinary course of business of the Century Investment Trust at Tucson. I don't believe that form was available to any person upon the counter of the company at Tucson. I do not actually know who mailed this letter marked Government's Exhibit 164 for identification. I know it was the custom to mail that type of letter from the Tucson office. As a rule Mrs. Fricke took care of our mail there; that is the actual mechanical handling of it. *J. H. Shreve and A. C. Shreve didn't do the mailing down there.* I know that Government's Exhibit 164 is the type of letter that was mailed from the Tucson office. Government's Exhibit 179 for identification is a letter signed by D. H. Shreve, and also Government's Exhibit 191 for identification. They are form letters and it was

the practice to mail them to me at Tucson from the Phoenix office, and then in turn the Tucson office would mail these letters out to whomsoever they were addressed. I don't know personally whether either of these letters identified as Government's Exhibits 179 to 181 for identification were ever mailed from the Tucson office. Government's Exhibit 183 for identification is a letter signed by Glen O. Perkins. He was the same person I testified came over to Arizona and participated in the organization of the Arizona Holding Corporation with Mr. James, Dr. Thomas and Dr. Morris. That is his signature upon letter marked Government's Exhibit 183 for idenification. That letter apparently was mailed from Tucson. The envelope has a Tucson post mark. I do not know personally who mailed that letter. I do not know the exact time D. H. Shreve came here but I do know that after he came, as far as I was concerned, he was in charge of the company, and that would be up to the time the companies closed. I have no way of fixing the time that Dan Shreve came over. The only way I could fix it was in the order of sequence in which the various Mr. Shreves were in Arizona. Jesse was the first one, Archie was the next one and Dan was the last one." (R. 580, 581, 582).

No. 8781

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JESSE H. SHREVE and ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF FOR APPELLEE

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Assistant United States Attorney.
Attorneys for Appellee.

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BRIEF FOR APPELLEE

OPENING STATEMENT

We do not believe that appellants' brief contains sufficient statement of the facts or the evidence to enable the Court to properly determine all of the questions raised. However, rather than set forth the statement of the facts which the Government*

*Appellee is referred to as "Government" throughout this brief.

contends is necessary, we will take up the appellents' argument in the order that it appears in their brief and, where it becomes necessary, we will quote from the record in order to properly present the Government's theory.

ARGUMENT

FIRST

The first argument advanced by appellants covers Assignment of Error I. Appellants contend that the indictment was duplicitous because of certain allegations in the first count (Appellants' Brief, p. 13). Appellants argue that the word "hereinafter", as used in the indictment, refers not only to the subsequent portions of the count in which it is used but also to all subsequent counts. It is clear from the reading of the indictment as a whole that the word "hereinafter" as used in the first count refers only to the letters and representations affecting the scheme and artifice set out in the first count and repeated in the second and third counts of the indictment. After alleging in the second paragraph of the indictment that the defendants had devised and intended to devise a scheme, etc., and after naming the victims, Sweetland, Hohenstein and Baker, the paragraph concludes with this phrase, "which said scheme and artifice was substantially as follows" (2)*.

Does not this definitely and clearly advise the defendants that the misrepresentations immediately thereinafter set forth were made in connection with

*Unless otherwise indicated, figures in parentheses refer to pages of the printed transcript of record.

the scheme and artifice mentioned in paragraph two of the indictment?

The same is true of the letters set out in the first three counts of the indictment. Each letter is preceded by an allegation as follows: "Having devised and intended to devise said scheme and artifice as aforesaid, the defendants, for the purpose of executing said scheme and artifice did * * * place and cause to be placed in the United States Post Office * * * a certain letter" (6, 10, 12). This allegation is followed by setting the letters out in full. When we read this last allegation in connection with the allegations complained of by appellants, there can be no misunderstanding as to what the word "hereinafter" refers to.

As is said in the Government's brief in the former appeal, the construction suggested by appellants is strange, unnatural and absolutely unsound. The defect, if any, is one of form only and should be disregarded.

18 U. S. C. 556.

Cowl v. United States, 35 F. (2d) 794-798.

Horn v. United States, 182 Fed. 721-726.

SECOND

The second division of appellants' argument covers Assignment of Error II (Appellants' Brief, p. 14). Appellants contend that the bill of particulars furnished by the Government prior to the trial,

which was the third trial of the case, was evasive, uncertain and incomplete. No where in their brief do appellants point out how or in what manner they were prejudiced by the ruling of the trial court. To suggest that appellants could be prejudiced by the failure to furnish any particulars whatever for the third trial of the case, would be to indulge in a fiction too unreasonable to be given serious consideration by any court.

Ciafirdini v. United States, 266 Fed. 471.

A bill of particulars was furnished. The trial judge, in his discretion, determined that the Government had sufficiently complied with the order for a bill of particulars. Without a more specific and definite showing of prejudice than appears in the record in this case, this assignment should be promptly disposed of. The authorities cited in our brief in the former appeal are particularly applicable where there has been a prior trial and the trial court is satisfied with the bill furnished.

Wong Tai v. United States, 273 U. S. 77-82.

Dunlop v. United States, 165 U. S. 486-491.

Rosen v. United States, 161 U. S. 29-35.

Appellants cite decision of this Court in support of their contention—*Kettenbach v. United States*, 202 Fed. 377. We are willing to have the Court apply the principles laid down in the Kettenbach case to the present case.

THIRD

This division of appellants argument is based upon Assignment of Error XXIV (Appellants' Brief, p. 16). Appellants contend that the Court erred in permitting witness Fierstone, a Government accountant, to testify that stock in the Security Building and Loan Association held by the Century Investment Trust Corporation valued at $99,457.50, was charged off as a loss on December 16, 1931. Appellants' argument is based upon two grounds, first, the transaction occurred after the last date of any indictment letter; second, that the transaction occurred subsequent to the date any scheme was executed as fixed by the bill of particulars. The Court instructed the jury that evidence relating to transactions after October 24, 1931, would only be considered for the purpose of determining intent (876). There was no exception taken to this instruction. The instruction is a correct statement of the law. The evidence objected to was properly admitted for the purpose of showing intent.

Stern v. United States, 223 Fed. 762-764.

Little v. United States, 73 F. (2d) 861-867.

Samuels v. United States, 232 Fed. 536-542.

In the case of *Stern v. United States*, supra, it appears that after appellants were arrested they effected the sale of property mentioned in one of the counts of the indictment. The Court said this was a fact for the consideration of the jury.

The second ground advanced in support of this

assignment is without merit for the same reasons set forth herein in discussing the first ground, namely, that acts of the defendants and circumstances after the commission of the crime, frequently point more conclusively and unerringly to the guilt of those accused than do their prior acts. The authorities last above cited support the ruling of the trial court.

Appellants contend that the Guardian Western Company is not mentioned in the indictment or bill of particulars and, therefore, according to their theory, its name could not even be mentioned at the trial. The Guardian Western Company had nothing whatever to do with the transactions covered by the testimony. The witness' testimony was based upon the books and records of the Century Investment Trust and the Arizona Holding Company, both of which companies were mentioned in the indictment and bill of particulars and the books of both companies were in evidence. The defendants were sufficiently advised by both the indictment and bill of particulars that they would be required to meet testimony touching upon the contents of those books.

FOURTH

Under this division appellants have grouped Assignments of Error III, IV, V, VI, XXXV, VII and XXV (Appellants' Brief, ps. 20-40). They are all based upon the Court's rulings sustaining objections to questions asked defendant Archie Shreve relating to certain conversations. In order to properly present this matter to the Court, we deem it necessary to refer to that part of the record containing

the conversations to which the Government witnesses Perkins and Hobbs testified. In this connection we do not feel that it is necessary to set out in this brief any conversations except the ones where the defendant Archie Shreve was present, as he is the only witness offered in behalf of the defendants in regard to such conversations.

The only conversations testified to on direct examination by the witness Perkins is found in the record on pages 615, 616, 621, 622 and 623. No where in any of this testimony does it appear that the defendant Archie Shreve was present at any of these conversations. Testimony set out in appellants' brief (30-31) was part of the cross-examination of the witness Perkins (641-642). We do not believe that the able counsel for appellants means to seriously contend conversations can be opened up on cross-examination and then be used as the basis for introducing self-serving statements of the defendants.

Even in the cross-examination set out in the brief the witness definitely stated, "Mr. Whitney and Mr. Osborne were not discussed in the conversations in San Diego at which Jesse Shreve, Archie Shreve, John Hobbs and myself were present in Jesse Shreve's home." All that the Government testimony amounted to was that the witness did have a conversation with defendant Jesse Shreve in regard to the liquidation of the company and there was no attempt to detail what was said.

The same is true of the testimony of witness Hobbs, set out in the brief (Appellants' Brief, ps.

31-33). He mentions only the subject of the conversation and did not attempt to detail what was said. Keeping in mind the testimony of Perkins and Hobbs in regard to these conversations, let us now consider the assignments of error based upon the Court's refusal to permit defendant Archie Shreve to testify as to certain conversations between those witnesses and the defendants.

Assignment of Error III (Appellants' Brief, ps. 20-23):

An effort was made to have defendant Archie Shreve testify as to what was said in the conversation between Jesse Shreve, Perkins and the witness which occurred "at or about the time the Century Investment Trust and Security Building and Loan Association opened offices in Phoenix." No attempt was made to identify this conversation with any conversation Perkins had testified to. Therefore, even under the defendants' theory, no proper foundation was laid for its admission. This was a very apparent attempt on the part of the defendants to prove a defense by introducing self-serving declarations about conditions and transactions instead of proving the conditions and transactions by proper direct and competent evidence. The purpose of the offered testimony is made clear by counsel's own statement: "*MR. HARDY: It is not laid for the purpose of impeachment. The question was asked and predicated in regard to future business of the Century Investment Trust and the Arizona Holding Corporation*" (*763*). No claim was made by counsel at the time that the evidence was offered for the purpose of clearing up and explaining a conver-

sation the witness Perkins had testified about.

Assignment of Error IV (Appellants Brief, ps. 23-25):

The statement in appellants' brief shows that the witness Archie Shreve was permitted to testify that there was a conversation between the parties named and that the conversation was with reference to the affairs of the Security Building and Loan Association. That was all that Hobbs had testified to (389-390).

The offer of proof found in appellants' brief (Appendix, ps. 1-2), contains a statement of what defendants expected to prove in regard to this conversation. This offer in evidence is not materially different from the testimony of the witness Hobbs except that it details what was said. The purpose of the Government's evidence was not to prove what was said, but merely to prove that Hobbs and Perkins did go to San Diego to consult with the defendants about the affairs of the different companies. These facts are admitted both by the testimony of the defendant Archie Shreve and by the offered proof. The exclusion of the offered evidence could not have possibly prejudiced appellants.

Assignment of Error V (Appellants' Brief, ps. 25-26):

It is contended under this assignment that the Court refused to permit the defendants to make an offer of proof with regard to the excluded testimony concerning the conversations referred to in

Assignments of Error III and IV. The Court did give appellants permission to make such an offer. The Court merely refused to permit them to make the offer in the presence of the jury and instructed counsel to write it out (912). We would like to say at this time, in connection with this offer as well as in connection with all the offers which are set out in the appendix to appellants' brief, that the Court never ruled on any such offers. This omission of the ruling on the part of the Court was due, perhaps, to the fact that appellants failed to ask for such a ruling. We do not believe that any litigant should be permitted to file a written offer of proof with the Clerk and then, without asking the Court to rule upon such offer, assign the failure of the Court to rule as error.

Assignment of Error VI (Appellants' Brief, ps. 26-28):

This is such a clear example of a self-serving statement that it seems unnecessary to devote a great deal of time and space to discuss it. There is no claim by appellants that there was any testimony in behalf of the Government in which the conversation offered in evidence was mentioned. The offer of proof (Appendix, Appellants' Brief, ps. 4-5) clearly discloses the self-serving nature of the offered evidence. The appellants have offered no possible theory under which it might be admissible.

The offered testimony was in regard to the alleged conversation between the defendants and the witness Perkins concerning Government's Exhibit 207. No conversation having been testified to by

any of the Government's witnesses, this was just an attempt to put in defensive matter by way of self-serving statements in place of putting the defendant Jesse Shreve on the stand to testify directly regarding his connection with the exhibit in question (798, 821).

Assignment of Error XXXV (Appellants' Brief, p. 28):

Appellants attempted to have the defendant Archie Shreve testify in regard to a conversation between Jesse Shreve, Perkins and the witness, which the witness claimed took place in San Diego, California, in February, 1930. Appellants failed to point out the part of the record where there is any testimony on the part of the Government concerning any such conversation. We have searched the record and have failed to find any such testimony on the part of the Government. Therefore, under appellants own theory, the evidence is inadmissible, there having been no proper foundation laid for its introduction.

Assignment of Error VII (Appellents' Brief, p. 29):

This assignment is based upon the alleged refusal of the Court to permit appellants to make an offer of proof concerning the conversation referred to in Assignment of Error VI. The alleged conversation was with reference to Government's Exhibit 207. The assignment is without merit, first, because the Government introduced no evidence in regard to any such conversation; second, because the

Court did not refuse permission to make the offer; third, the offer was made in writing and filed with the Clerk. Appellants failed to ask for any ruling upon this offer and the Court made none.

In the case of *Carver v. United States*, 164 U. S. 694, cited by appellants, the evidence excluded concerned a conversation which was not only part of the res gestae but a Government witness had testfied to details of the conversation. In addition, the conversation was between the defendant and the deceased, whom he was accused of killing. In the present case, the conversations were all between co-schemers who were accused jointly of devising and intending to devise a scheme to defraud.

The case of *Bogk v. Gassert*, 149 U. S. 17, cited by appellants, was a civil case in which one of the parties was permitted by the Court to testify in regard to the conversation had at the time of the execution of certain written instruments. The defendant then was denied the right to give his version of the transaction gathered from the same conversation. The situation in the present case is entirely different and we cannot see where the decision in the Bogk case supra has any application.

In the case of *Perrin v. United States*, 169 Fed. 17, the excluded evidence was documentary and was all part of the same transaction. We wish to call the Court's attention to the authorities cited in Judge Gilbert's dissenting opinion:

> "It follows from the general principle that distinct or separate utterance is not receiv-

able under this principle. The boundary line here is usually defined by saying that all that was uttered at the same time on the same subject is receivable." (Wigmore on Evidence, Section 2119).

In the present case we contend that, in many of the instances complained of, there was no testimony on the part of the Government where the conversations referred to by the witness for the defense was even mentioned. In the instance where those conversations had been mentioned by the Government witness, the conversation itself was not repeated and all the Government's evidence brought out was the fact that there had been a conversation about the affairs of the corporation involved. The witness for the defendants was permitted to go as far in his testimony as were the witnesses for the Government. Under the law as stated in the above quotation from Wigmore this was all appellants were entitled to do.

In this connection, we think it appropriate at this time to complete the quotation from Corpus Juris, the first part of which is set out in appellants' brief (p. 33):

> "* * * They are excluded not because they might never contribute to the ascertainment of the truth, but because if received they would most commonly consist of falsehoods fabricated for the occasion, and would mislead oftener than they would enlighten." (16 C. J. 1265, page, 636.)

We quote the foregoing because we believe it ex-

plains the reason why defendants in a criminal case should not be permitted to go beyond the boundary line mentioned in the above quotation from Wigmore.

This is particularly true in the present case where the appellant, Jesse Shreve, did not take the stand and subject himself to cross-examination. An effort was made to introduce these self-serving statements of Jesse Shreve through the testimony of a co-defendant who claims to have overheard the statements. This testimony was not offered for the purpose of proving there had been a conversation, the main purpose being to prove the truth of the self-serving statements.

Assignment of Error XXV (Appellants' Brief, p. 38):

This assignment is based upon the admission in evidence of Government's Exhibit 207 (943). This exhibit was identified by Perkins (653), and also by Government's witness, Manuel J. King (722). Manuel J. King identified the exhibit as one he received through the mails at Tucson, Arizona, when he was getting dividends from the company. The objections to the exhibit are set out in the record and will not be repeated here (723). It was not necessary to have direct evidence that Jesse Shreve deposited this instrument in the mail himself. We believe the above testimony was sufficient to prove the exhibit was mailed out by the Century Investment Trust. During all the time of this company's existence it had the same offices as the Arizona Holding Corporation, Phoenix, Arizona (258), and

at all times was under the direction of some one of those charged in the indictment. We think the evidence as a whole clearly shows that Jesse Shreve, Archie Shreve, Dan Shreve, Glen Perkins, John Hobbs and J. G. Cash all had a part in devising and carrying out the scheme set out in the indictment. There is evidence that the appellant Archie Shreve was for a time in actual charge of the Phoenix office. When he was not in charge, Dan Shreve or Glen Perkins, both of whom are proven co-schemers, were in charge and there is also evidence that at all times Jesse Shreve was in fact the man in control of the management and had the last say in connection with the affairs of all the companies. All of this is sufficient to justify the introduction of Government's Exhibit 207.

Levinson v. United States, 5 F. (2d) 567.

McIntyre v. United States, 49 F. (2d) 769.

Havener v. United States, 49 F. (2d) 196.

Cochran v. United States, 41 F. (2d) 193.

FIFTH

Assignments of Error VIII, IX, X, XI and XII (Appellants' Brief, ps. 41-45):

All of the assignments in this group relate to the admission in evidence of exemplified copies of deeds, mortgages and assignments of mortgages, as evidence on behalf of the Government. The objection to these exhibits is that exemplified copies were not admissible because the Government failed

to prove the originals were not available. The Act of Congress definitely settles the question raised by these assignments.

28 U.S.C.A. 688 (and citations thereunder).

Appellants contend that that section applies only to foreign records. The last sentence of the section contradicts appellants' contention in this regard. If we follow appellants' construction of this section, we then have the anomalous situation of one rule of evidence as to records of the state where the Federal Court is sitting and a more liberal rule as to records of another state.

Appellants' theory is not supported by any of the authorities cited under Section 688 supra. On the contrary, they hold opposite to appellants' theory.

Myres v. United States, 256 Fed. 779-782.

SIXTH

Assignments of Error XVIII, XIX and XX (Appellants' Brief, ps. 59-62):

These assignments are based upon the admission in evidence of the books and records of the corporations named in the indictment. We disagree with some of the conclusions appellants have drawn from the testimony in the case. In the first place, the witness Watt testified that he did not rewrite any of the books of the Security Building and Loan Association (347). This is the only company involved in the first three counts of the indictment. The witness also stated that he did not rewrite any books of the Arizona Holding Corpora-

tion, but merely brought some of them up to date (348). He further testified that it was not necessary to make any changes in the books of the Security Building and Loan Association (349). He further testified that the entries made by him in the books of the Century Investment Trust and the Arizona Holding Corporation were all made from the original sources (354). In other words, the books were kept in the regular order of business.

If appellants' position is correct and the books and records were not admissible in evidence, they were made inadmissible by the acts and omissions of appellants themselves. To make accused persons benefactors of their own irregularities, would be to announce a dangerous principle of law. Defendants in criminal cases are now surrounded by ample protection without enlarging that protection to the extent asked for by appellants.

The evidence concerning the books was practically identical with the evidence at the prior trial and this same question was raised on appeal and this Court passed upon it in its former opinion. *Shreve v. United States*, 77 F. (2d) 2, 7. The quotation from the opinion contained in appellants' brief settles this question contrary to appellants' contention (Appellants' Brief, p. 64). The authorities in support of the admissibility of books and the circumstances in this case are unlimited.

Butler v. United States, 53 F. (2d) 800, 806.

Barrett v. United States, 33 F. (2d) 115.

The former opinion in this case was not the first time this Court had announced such a rule.

Lewis v. United States, 38 F. (2d) 406, 414.

The opinion in the Shreve case, supra, became the law of this case and controls the actions of counsel and the rulings of the Court in the subsequent trial. The books of the Security Building and Loan Association were properly admitted in evidence in proof of the first three counts and the books of the Century Investment Trust and the Arizona Holding Corporation were properly admitted in evidence in proof of the remaining counts.

SEVENTH

Assignment of Error XXIII (Appellants' Brief, p. 67):

This assignment is based on the testimony of Fierstone with reference to an audit of the books of the Century Investment Trust, and error is claimed solely upon the ground that the books themselves were not properly in evidence.

Our answer to appellants' sixth argument is also an answer to this assignment. In the brief, however, (Appellants' Brief, p. 66), appellants precede their argument on this assignment with the statement that the testimony of Fierstone based upon his audit of the books of the Security Building and Loan Association and the Arizona Holding Corporation was also erroneously admitted. While we feel that the former opinion is decisive of that question, we want

to again call the Court's attention to the fact that the appellants' complaint of the books of the Century Investment Trust and the Arizona Holding Corporation does not apply to the books of the Security Building and Loan Association.

EIGHTH

Assignments of Error XIII, XIV, XV and XVI (Appellants' Brief, ps. 68-73):

These assignments are based upon the admission in evidence of certain books and records of the First National Bank of Prescott, Arizona, being Government's Exhibits 84, 90, 92, 93 and 94.

Assignment of Error XIII (Appellants' Brief, p. 68):

This assignment has to do with the admission in evidence of Government's Exhibit 84, consisting of the daily statement showing the condition of the First National Bank of Prescott. This exhibit is a part of the bookkeeping system of the bank and one of the permanent records. Witness Trott testified he made the record himself and that the entries were correct (298, 299, 300).

There is nothing on the face of this exhibit or in the record anywhere that shows how it could possibly be prejudicial. The appellants in their brief have failed to point out how any prejudice could arise from the introduction of this exhibit. So, under the well-settled rule that harmless error will not be considered, there can be no merit to this assignment, whatever view we take.

Assignment of Error XIV (Appellants' Brief, p. 70):

This assignment refers to Government's Exhibit 90. The witness Evans testified that payment for the certificates of deposit was delivered to him. At the time of the making of the bank record, which is Exhibit 90, the witness was in sole charge of the management of the bank. He testified that the item was a correct record of the transaction (308). In spite of his testimony on cross-examination, this was the first entry of this transaction. There undoubtedly were other entries in the books of the bank showing the various steps in the history of this $20,000, but the item in question is the recorded history of one of those steps and, as to that fact, must, of necessity, be an original and a permanent record thereof.

Assignment of Error XV (Appellants' Brief, p. 71):

This assignment refers to Exhibits 92, 93 and 94. The same witness, Evans, testified in regard to the entries included in these exhibits; that they were made by him and that they were correct records of the transaction which they purported to record (311). In connection with this witness' statement on voir dire examination (312), to the effect that these items were secondary and auxiliary records, it must be apparent, even from the cold record in this case, that throughout his testimony this witness was attempting to shield the appellants. The items referred to were not secondary or auxiliary records. They were, in fact, not only the first per-

manent records of these particular transactions but they were, in our opinion, the only permanent records thereof. Evans, on further questioning, stated that the entry he referred to on voir dire was one of the steps of the complete record and that Exhibit 91 was the first record (313). In other words, it was a record of the first step in the transaction. The entries in Exhibits 92 to 94, inclusive, were introduced in evidence to show the subsequent steps in this transaction and without a record of these steps there would be no complete record of the transaction. Even if we were to apply the strict and stringent interpretation of the opinions of this Court which appellants have given them, we have met that requirement and the foundation for the introduction of the records was complete.

Barrett v. United States, 33 F. (2d) 115.

Butler v. United States, 53 F. (2d) 800.

Foster v. United States, 178 Fed. 165.

In *Barrett v. United States*, supra, the Court, in discussing the fact that the books were offered as proof, said:

> "If the books, properly identified, assist in proving that fact they are admissible whether Barrett knew of the books or not."

And, quoting from *Butler v. United States*, supra:

> "Books of account are often received to prove a material fact where the party has no

connection with the books or the business reflected by them."

NINTH

Assignments of Error XXI and XXII (Appellants' Brief, ps. 81-83):

Assignment of Error XXI has to do with testimony of Government witness Schroeder, which testimony was based upon his audit of the books of the three companies named in the indictment.

Assignment of Error XXII is based upon the Court's failure to strike his testimony referred to in Assignment of Error XXI.

The only objection to the testimony was that it was based upon an audit of books other than those in evidence. This is also the grounds of the motion to strike.

We submit that appellants have placed an erroneous construction upon the testimony and, therefore, necessarily have drawn a wrong conclusion. Every question asked the witness in reference to his audit confined him to the books in evidence (657-658). The witness himself stated at the very outset "the audit I made and which I will testify in regard to, is made on the books now in evidence in this case and based upon those alone." (657).

It is true the witness testified in regard to examination of other records and public documents (Appellants' Brief, ps. 84-86), but he very definitely

stated that nothing in any of such records entered into his audit as testified to (687). Undoubtedly in the auditing of a set of books of any corporation, an auditor might search through the books of many other companies or through the entire record in some public office. Let us assume that in all of such search, he failed to find a single item that had any connection or reference to the company whose books he was auditing. Would it be necessary to bring into court every book and record that the auditor examined and searched through before he could testify as to his audit? Ridiculous as this proposition sounds, it seems to us to be the position appellants have taken. Starting with a false premise and necessarily coming to a wrong conclusion, the authorites cited in support of appellants' contention are not applicable to the true facts in this case.

TENTH

Assignments of Error XXVI and XXVII (Appellants' Brief, ps. 87-89):

Assignment of Error XXVI is based upon the admission in evidence of Government's Exhibit 170 (946).

Assignment of Error XXVII is based upon admission in evidence of Government's Exhibit 172 (947).

Exhibit 170 is a real estate mortgage dated April 16, 1930, from one Perry to Yavapai County Savings Bank, on property located in Yavapai County (548).

Exhibit 172 is a Sheriff's deed dated May 3, 1933, of the same property to the Yavapai County Savings Bank, issued in pursuance of a foreclosure of Exhibit 170.

Appellants have missed the purpose for which these exhibits were introduced in evidence. It was not for the purpose of showing that no title had been received by reason of the deed from Blackburn, dated June 26, 1930 (Gov. Ex. 144) (517), the Perry mortgage would in no way prevent Blackburn from having and conveying title two months after the Perry mortgage was executed.

The purpose of this evidence was to show that on July 14, 1930, when the property was deeded to A. E. Reyburn (Gov. Ex. 141) (512), and she executed a mortgage back for $8700, and that on July 21, 1930, when this Reyburn mortgage was assigned to the Security Building and Loan Association (Gov. Ex. 143) (516), the Reyburn mortgage was not a first mortgage as represented by the appellants.

Schroeder testified (576) that the Reyburn loan was included in the figures $193,929.46, found in Government's Exhibit 160 (659). The Perry mortgage executed in April, 1930, and not finally foreclosed until the Sheriff's deed in May, 1933, must have been a prior lien to that of the Reyburn mortgage. Furthermore, the loan was in excess of the value of the property. Russell testified that in 1930 the property was worth $6,000 (551). Further evidence that this mortgage was fraudulent is the fact that Reyburn, the mortgagor, was used merely as a dummy for the entire transaction (513).

Authorities cited in appellants' brief, in support of their argument that the Sheriff's deed was not admissible, are not applicable. The law that you cannot prove the facts upon which a judgment was rendered by mere proof of the judgment as against a third party is, we concede, well settled, but it is also well settled that a judgment is evidence of its rendition and the authorities quoted from in appellants' brief (p. 92) so state.

ELEVENTH

Assignment of Error XXVIII (Appellants' Brief, p. 94):

This assignment is based upon the testimony of the witness A. W. York. The answers of the witness are all set out in appellants' brief and we will not repeat them in full. The first answer on page 94 of the brief merely states the witness had received a letter from his daughter about a proposition the company she worked for had to make. This was only a preliminary explanation on the part of the witness. There is nothing harmful or prejudicial in it.

The first part of his second answer (Appellants' Brief, p. 95) is identical with the first answer. We quote the last part of the answer:

> "The purpose as I later on understood was for me to come over here and take charge of a ranch in the vicinity of Holbrook." (948).

This does not purport to be a statement of any-

thing his daughter said. It may well be that the understanding of the witness was based on conversations with appellants. This quoted part of the answer was not responsive and on a proper motion could have been stricken. No such motion was made.

In view of the overwhelming proof of the guilt of the defendants, this assignment is, in our opinion, frivolous, in spite of appellants vigorous and sincere plea for the preservation of salutary standards of law. We supplement appellants' plea by asking that justice be done in this case.

TWELFTH

Assignment of Error XXIX (Appellant's Brief, p. 97):

This assignment is based on the Court's sustaining an objection to a question asked witness Crane, who was an accountant testifying on behalf of appellants. The question asked the witness was not sufficiently broad or comprehensive to meet the requirements of a hypothetical question. It left too much to the imagination of the witness. We assume that the nature of the business, the exact relations between the Holding Company and the subsidiary would be elements that would have to be taken into consideration. A second question as to whether a certain manner of accounting is approved by the Internal Revenue Bureau of the United States is clearly improper. The system of accounting approved by the Internal Revenue Bureau for income tax purposes would have no possible bearing on this case. Even assuming that the method of having

the expense items of the Security Building and Loan Association paid by the Century Investment Trust, as testified to by Fierstone (Appellants' Brief, ps. 98-100), was the correct method of accounting, the Government had the right to show, as it did by Fierstone's testimony, the difference such a system would make in the showing of profit, in order for the jury to determine whether or not the representations made by the appellants were misleading.

THIRTEENTH

Assignments of Error XXXII and XXXIII (Appellants' Brief, ps. 103-104):

These two assignments have to do with the Court's instructions.

Assignment of Error XXXII (Appellants' Brief, p. 103):

The Court properly instructed the jury that a withdrawal from a scheme could not be effected by intent alone, but that there must be some affirmative action. Defendants' exception was on the ground that the Court should have defined what would constitute an affirmative act. The authorities cited by appellants (Appellants' Brief, p. 106), to the effect that the Court should explain the meaning of a technical or legal term occurring in the instructions, are not in point for the reason that the term "affirmative act" is neither a legal nor a technical term. This instruction was easily understood and easily applied. Any juror should be able to distinguish between intent and action. The use of

the word "intent" makes the meaning of the words "affirmative action" plain. A definition is unnecessary. If the Court undertook to tell the jury just what acts would be necessary to effect a withdrawal, it would have necessitated an analysis of almost the entire evidence in the case. Appellants might have had a meritorious complaint in that event. Whether the appellants withdrew from the schemes or when they withdrew were questions of fact for the jury to determine.

Assignment of Error XXXIII (Appellants' Brief, p. 104):

Appellants complain because the Court refused to instruct the jury that there was no evidence the appellants made any representations that the Security Building and Loan Association had a paid-in capital stock of $300,000, as alleged in the indictment.

Again we say that it was for the jury to determine what charges had or had not been proved. The jury was fully instructed that the indictment was not to be considered as evidence (855-856). This was all that was necessary to protect the rights of the appellants. We must assume that the jury followed the instructions of the Court. The Court also instructed the jury that the Government need not prove all of its allegations, only enough to prove the guilt of the defendants (868).

FOURTEENTH

Assignment of Error XXXIV (Appellants' Brief,

p. 107):

This assignment is based upon the Court's denial of appellants' motion for an instructed verdict. In their brief appellants abandon all grounds upon which this motion is based, except as to the sufficiency of the evidence to connect the appellants with mailing the indictment letters.

Appellants make much of the fact that counsel for the Government remarked that it had not been shown that the witness Archie Shreve had knowledge "where or how or who prepared this" (referring to the indictment letters). This position of the Government counsel was justified, the witness stating that he never heard of any of the letters or knew anything about them or had anything to do with them, etc. (796).

We know of no principle of law in connection with cases of this kind that is so well established as the one that each one of the schemers need not participate in every act done in the furtherance of a scheme. He may not know what his partners are doing, but he is bound by their acts.

Silkworth v. United States, 10 F. (2d) 711.

Schwartzberg v. United States, 241 Fed. 348.

Wilson v. United States, 190 Fed. 427.

Appellants concede that it had been established by the evidence, (1) that it was a business custom to mail the letters; (2) that the letters were mailed in the general or regular course of business (Apellants' Brief, p. 111).

We claim that in addition to the above facts, we have also complied with the rules stated in *Freeman v. United States*, 20 F. (2d) 748, which is cited in appellants' brief, to the effect that the custom of mailing was the appellants'. It is clearly proven that Jesse Shreve was the actual head of the company. He placed men in charge of the different offices. Therefore, anything done by these men was under the authority of Jesse Shreve and he is bound. This is particularly true where the men in charge are proven to be co-schemers such as Dan and Archie Shreve and Glen Perkins, and we believe that this could also include John Hobbs and J. G. Cash. As was said in the Beck case, 33 F. (2d) 107, cited in appellants' brief (p. 109):

> "That the mails were used is clear. That the defendant Beck is bound if Barrett used the mails in the ordinary course is not open to serious dispute. The law does not now require an intent to use the mails as part of the scheme, as formerly. It is sufficient if they are used. Beck placed Barrett in the position of general manager of the corporation, leaving to him the direct management of the business while Beck primarily looked after his own business."

In the Beck case, however, there was no evidence of Barrett's connection with the mailing.

The testimony set out in appellants' brief, (ps. 30-40) does not contain all of the evidence connecting the appellants with the mailing of the indictment letters. We believe, however, it is sufficient

to prove their connection therewith. Many of the letters were signed by Perkins or Dan Shreve and mailed out under their direction. In order to get all the evidence of appellants' connection with the mailing, it is necessary to read the entire testimony of Perkins. We particularly refer to the following places in the record, pages 615, 616, 621, 622, 623, 635 and 636.

Referring to Jesse Shreve, Perkins said:

> "We knew him as the boss, he was the man who directed us * * * (636). * * * The orders for the Tucson office came from the Phoenix office. * * * It came from J. H. Shreve or Archie Shreve or when Dan Shreve was here." (636).

Without repeating it, we wish to call the Court's attention to the entire testimony of Perkins found on page 637 of the record. There is further testimony in the record on the question of mailing, which we will not quote (638, 639, 652).

CONCLUSION

We submit that there is ample evidence connecting the appellants, and each of them, with the mailing of the indictment letters.

Having discussed all the issues raised by the appellants, we respectfully submit that, because of the overwhelming proof of appellants' guilt and the lack

of any prejudicial error, the judgment should be affirmed.

Respectfully submitted,

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K. BERRY PETERSON,
Assistant United States Attorney.
Attorneys for Appellee.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.
JESSE H. SHREVE, ARCHIE C. SHREVE, DANIEL H. SHREVE, GLEN O. PERKINS, and W. C. EVANS,
Defendants and Appellants.

No. 8781

REPLY BRIEF OF APPELLANTS JESSE H. SHREVE and ARCHIE C. SHREVE

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No. 8781

REPLY BRIEF OF APPELLANTS
JESSE H. SHREVE and ARCHIE C. SHREVE

Counsel for the Government, in their brief suggest that appellants' (defendants') opening brief does not contain a sufficient statement of the facts or evidence. They do not point out wherein defendants' brief is insufficient in this respect, nor do they supply the asserted insufficiency. Counsel think that the statement of the facts in defendants' opening brief is sufficient to present a fair understanding of the case, measured by the prescribed page limitation of their brief and the size of the record.

Counsel for the Government apparently for the

lack of a more convincing reply, meet some of the questions raised by relying upon the often asserted expressions like "no prejudice is shown". Illustrations are found on pages 4, 9 and 19 of their Brief. They supplant a plea of defendants "by asking that justice be done in this case" p. 26). The thought had not occurred to defendants or their counsel that justice will not be finally done. They say again that because of "lack of *any* prejudicial error, the judgment should be affirmed" (p. 32). That is often the refuge of prosecutors who, when confronted with the careless manner in which they proceeded in the Court below, implore the reviewing Court to condone that carelessness by finding the error harmless rather than prejudicial. It is not begging the question to say that defendants surrounded themselves with every protection accorded them by well conceived and long applied principles of law when they disclaimed the guilt charged to them by the indictment. Counsel for the Government having ignored these principles, with the sanction of the trial court, should not now be heard to justify their conduct by invoking amorphisms which themselves might also result in depriving defendants of justice. Repeated rejection of wholesome principles of law often require that justice prevail notwithstanding the verdict.

The Congress has said that this Court shall give judgment after an examination of the entire record "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties" (Sec. 391, Title 28, USCA). The errors asserted here go far beyond "technical errors, defects or exceptions", and because they do it seems to us that the limitations of the statute last quoted itself marks the point where harmless error

ends and prejudicial error begins. The errors we have pointed out are not technical errors or defects,—they are errors of substance which even the most inexperienced practitioner would recognize and avoid.

Counsel for the Government have brought themselves within the criticism of *Coulston vs.* U. S. (CCA10) 51 Fed. (2nd) 178, 182, where it is said:

> "To all of this, the appellee answers that the jury convicted upon abundant evidence and that the errors complained of were not prejudicial. The same contention was made to the Eighth Circuit Court of Appeals many years ago, and in response thereto that Court (Sanborn, Van Devanter, and Phillips sitting) said: 'The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistance upon the admission of incompettent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the

prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution, which resulted in the verdict of guilty' ".

ARGUMENT

FIRST

(Appellee's Brief, p. 2)

Government counsel, in order to avoid the duplicity of the indictment, are required, as were we, to parse the indictment in order that it may be understood. An indictment should be free from such imperfection. If the indictment were a clear exposition of a criminal pleading, it should not require explanation to interpret it.

Sec. 556, Title 18, USCA, is inapplicable because duplicity is more than a matter of form.

Creel vs. U. S., (CCA8) 21 Fed. (2d) 690.

SECOND

(Appellee's Brief, p. 3)

Government counsel state that we do not point out how defendants were prejudiced by the ruling of the court on the insufficiency of the bill of particulars (p. 4). The bill itself points out the prejudice. It is exemplified by the next succeeding Assignment of Error XXIV (appellants' opening brief pps. 16-20). Prejudice is further pointed out at other places in defendants' opening brief. When the Court ordered the bill of particulars, thus re-

versing the order of the trial court in denying it (*Shreve vs. U. S.*, 77 Fed. (2d) 2), this Court knew that the information which counsel for the Government refer defendants to, arising out of the previous trials of the case, was then available to defendants. The fact is counsel for the Government have, with the trial court's sanction, substituted their will for the judgment of this Court and thus they have deprived defendants of something this Court said they should have.

Ciafirdini vs. U. S., 266 Fed. 471, cited by Government counsel, is not in point, because the bill was not ordered by the appellate court after the first and before the second trial of the case as herein. *Wong Tai vs. U. S.*, 273 U. S. 77, *Dunlop vs. U. S.*, 165 U. S. 486, and *Rosen vs. U. S.*, 161 U. S. 29, are not in point because there the questions involved the exercise of discretion by the trial court which the Supreme Court refused to disturb.

THIRD

(Appellee's Brief, p. 5)

The testimony of the Government's witness Fierstone did go beyond the last day of any indictment allegation. The trial court instructed the jury that such evidence could only be considered for the purpose of determining intent (R. 876). Counsel for the Government insist that the instruction is enough to authorize the testimony and point out that no exception was taken to this instruction. Undoubtedly the testimony was admissible for the purpose of proving intent, but defendants were not informed what testimony would be offered to prove intent,

and therein partly lies the insufficiency of the bill of particulars.

We agree with counsel for appellee "that acts of the defendants and circumstances after the commission of the crime, frequently point more conclusively and unerringly to the guilt of those accused than do their prior acts" (p. 6) but nothing could more perfectly point out the insufficiency of the bill of particulars than the omission to specify the evidence which would be relied upon to constitute those acts.

FOURTH

(Appellee's Brief, p. 6)

Under this section of their brief, Government counsel attempt to meet the assignments of error relating to the refusal of the trial court to permit defendant Archie C. Sdreve to testify to conversations opened by Government witnesses Perkins and Hobbs concerning him and his co-defendant, Jesse H. Shreve (Appellant's opening brief, pps. 20-40). Government counsel state that conversations cannot be opened on cross-examination and then used as a basis for introducing self-serving statements of the defendants (Appellee's brief, p. 7). Again, counsel misapply the law of self-serving statements. We have pointed out the law and its true application (Appellants' Brief, p. 32-36).

The fact that the conversations were brought out on cross-examination does not alter the rule of the right of defendants to explain or give their version of the conversations. Perkins was still a Govern-

ment witness, although testifying on cross-examination. Besides, he did not tell the whole story on direct examination. His narrative was then limited to the defendant Jesse H. Shreve (R. 615, 621, 622, 623). On cross-examination he associated defendant Archie C. Shreve with the conversations (R. 641-42) and then, as we have shown in the opening brief (R. 30-37) the defendant Archie C. Shreve should have been permitted to give his version of those conversations. The jury in arriving at its verdict must have considered not only the testimony of Perkins on direct examination but also on cross-examination.

Government counsel assert that the testimony of the defendant Archie C. Shreve was an attempt to put in defense matters by way of self-serving statements instead of calling the defendant Jesse H. Shreve to testify on his own behalf (Appellee's Brief, pps. 10-11). We know of no rule, and we have been unable to find one, which deprives a defendant from receiving the benefits of his co-defendant's testimony. The correct conclusion is that the defendant Arcdie C. Shreve should have the same right to testify both for himself and his co-defendant as had Perkins and Hobbs the right to testify against both of them.

With regard to defendants' offer of proof, Government counsel say appellants failed to ask for any rulings upon this offer and the Court made none (Appellee's Brief, p. 10). How could the trial court make a ruling upon something he would not hear? (R. 790). In view of the trial court's attitude, the defendants were hard pressed to preserve the record at all and undoubtedly went farther than they were required.

The facts are that Perkins and Hobbs, as Government witnesses, opened and gave testimony concerning conversations with both defendants. Then, under the authorities cited (Appellants' opening brief, pps. 32-36) defendants were entitled to give their version of the conversations.

Cf. Hills vs. U. S. (CCA9) 97 Fed. (2d) 710.

The conversations must have been material, otherwise Counsel for the Government would not have elicited them. When they say that "the witness for defendant was permitted to go as far in his testimony as the witness for the Government" (Appellee's Brief, p. 13) they overstate the record as will appear by comparing the testimony of Perkins (R. 641-642) and Hobbs (389-392) with defendants' offers of proof (Appellants' opening brief, appendix, pps. 1-15).

Appellee, at pages 14 and 15 of their brief, seek to justify the admission of Government's exhibit 207 (R. 722-727) because, as counsel for the Government say, the defendants and Dan Shreve, Glen Perknis, John Hobbs and J. G. Cash all had a part in devising the scheme. That is a curious justification in view of the objection that was made to admission of the exhibit in evidence (R. 723) and as assigned as error and briefed (appellants' opening brief, p. 38-40).

FIFTH

(Appellee's Brief, p. 15)

Counsel for the Government have not treated these assignments of error (Appellants' opening

brief, pps. 41-49) with the consideration their importance merits. The instruments embraced by the assignments of error, and the testimony relating to them, fill a large part of the record (Appellants' opening brief (p. 50, footnote 21). The resulting prejudice is not denied by Government counsel. They rely in justification upon Section 688, Title 28, USCA (Appellee's Brief, p. 16). That section has nothing whatever to do with these instruments because they are solely records of local County Recorders. Section 688, supra, as we have stated in appellants' opening brief, (P. 50, foot note 22) pertains only to foreign records, that is records of states, territories, and possessions of the United States other than the state of the forum, as these here are. Sec. 688, supra, provides:

> "All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any Court or office in any *other* State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the Territory or country, that the said testation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand

> and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the *said records*, and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."

Contrary to the statement of Gevornment counsel, the last sentence of the foregoing statute also applies to foreign records, as the words which we have italicized unquestionably demonstrate.

The statute was enacted to effectuate Section 1 of Article 4 of the Federal Constitution (the full faith and credit clause) and that provision of the Federal Constitution pertains only to acts, records and judicial proceedings of *other* states.

Atchison, T. & S. F. Ry. Co., vs. Sowers, 213 U. S. 55, 29 Sup. Ct. Rep. 397, 53 L. Ed. 695.

Myres vs. U. S., 256 Fed. 779, 728, cited by counsel for the Government, helps their position none because that decision treats upon the question of practice rather than evidence, but, if Government counsel insist that it supports their position, then it is contrary to the statute itself and the decision of the Supreme Court in *Atchison, T. & S. F. Ry. Co.*, supra.

SIXTH—SEVENTH

(Appellee's Brief, pps. 16-18)

These sections of Appellee's Brief are met by the arguments presented on the question in appellants' opening brief (pps. 59-66 and 66-88).

Counsel for the Government (p. 16) state:

> "In the first place, the witness Watt testified that he did not rewrite any of the books of the Security Building & Loan Association (347). This is the only company involved in the first three counts of the indictment".

That statement does not square with the testimony of the witness Watt. He testified:

> "I did not rewrite any books of the Security Building & Loan Association, except trace entries in the Building and Loan books which pertained to the Century Investment Trust or the Arizona Holding Corporation. *I traced them from the rewritten books of the Centry Investment Trust.*" (R. 347).

In addition, the witness Watt testified: "These rewritten entries in the Century Investment Trust had a bearing thereafter upon the books of the Security Building & Loan Association; they had a bearing before that time, if I understand your question correctly." (R. 349).

The defendant, Archie C. Shreve testified as follows:

> "I heard the testimony of R. F. Watt, witness for the Government, that he rewrote the books. I did not direct him to rewrite these books. I don't know anything about the rewriting of these books. I never heard tell of the books being rewritten before the trial of this case in Tucson in 1934. That is the first time I ever knew of these books being rewritten". (R. 777, 778).

Assuming, as stated by counsel for the Government (p. 18) that the opinion on the former appeal became the law of the case, nevertheless, that opinion is based upon the assumption that the defendants controlled the corporations named in the indictment. The law of the case announced in the decision on the former appeal assuredly does not bind the defendants for unauthorized acts of the Government witness Watt. In rewriting these books, he testified: "To a great extent, I relied upon information *I found myself* in order to rewrite these books" (R. 345). He testified that in rewriting the books, that neither defendant requested him to rewrite these books or counseled with him in rewriting them (R. 347). These acts of Watt take his evidence and these books beyond the law of the case. They are the personal acts of Watt himself as a result of which they bring into the record hearsay transactions, which were neither directed nor controlled by the defendants and which carry them beyond the decision on the former appeal thereby rendering them objectionable as hearsay transactions under the decisions of this Court in the following cases:

Wilkes vs. U. S., 80 Fed. (2nd) 285

Osborne vs. U. S.. 17 Fed. (2nd) 246

Greenbaum vs. U. S., 80 Fed. (2nd) 113

Pabst Brewing Company vs. E. Clemens Horst Company, 229 Fed., 913.

EIGHTH

(Appellee's Brief, p. 19)

This section of Appellee's Brief refers to assignments of error which relate to admission in evidence of records of the First National Bank of Prescott. Defendants were neither officers, directors nor employees of that Bank. (R. 300, 324, 337).

These were entries of a bank wholly disassociated from the indictment and defendants. There is nothing to show that these defendants "made such entries or caused them to be made or assented thereto", which this Court on the former appeal held was essential to show before these records were admissible. (*Shreve vs. U. S.*, 77 Fed. (2nd) 2, 7). Besides the records as admitted were hearsay transactions. (R. 300, 309, 312, 313).

Treating upon Government's Exhibit 84, counsel for the Government say that "The appellants in their brief have failed to point out how any prejudice could arise from the introduction of this Exhibit" (Appellee's Brief, p. 19). If the exhibit created no prejudice against the defendants, then why did counsel for the Government introduce it? It was prejudicial. The Exhibit was one of many hearsay transactions relating to the First National Bank of Prescott (R. 294-343) and, having been introduced,

counsel for the Government now say they are harmless. The transactions involved *personal* loans of $10,000.00 each to Glen Perkins, J. G. Cash and Joseph E. Shreve (R. 313, 314) totaling $30,000.00, and were paid by drafts of the *Securtiy Building & Loan Association* (Government's Exhibit 96, R. 316) as testified to by Government's witness Evans (R. 315). If this evidence was without prejudice, that does not compare with the importance Government counsel attached to it because the fact is the indictment was dismissed against Evans so as to qualify him to testify with respect to these loans and other transactions of the First National Bank of Prescott (R. 181) after his conviction on the former trial (R. 180).

On the former appeal this Court pointed out the way to admit these records, but that decision was ignored (*Shreve vs. U. S.*, 77 Fed. (2d) 7). And since there was no official connection between these defendants and the First National Bank of Prescott, the rule theretofore announced by this Court applied, as typlified by the following cases:

Osborne vs. U. S., 17 Fed. (2d) 246.

Wilkes vs. U. S., 80 Fed. (2d) 285.

And again, in emphasis of the Wilkes Case, this Court pointed to the error in admitting these records of the First National Bank of Prescott in *Greenbaum vs. U. S.*, No. 8739, decided August 10, 1938. Since that decision, and before, these records of the First National Bank of Prescott were just as inadmissible because of the objections taken to them against these defendants as were the records of the Clarence Sanders Store against the defendants Greenbaum.

NINTH

(Appellee's Brief, p. 22)

The Government's auditor and witness Schroeder blew both hot and cold. When interrogated by counsel for the Government he testified his audit was made from books and records in evidence or, in some instances, from books and records before the Court. On cross-examination he testified to the contrary.

For illustration, let us take the York loan (R. 658 et. seq.) While he testified he did not necessarily have to verify this transaction with the records of the Commercial National Bank of Phoenix (R. 683) still he couldn't recall whether he did or not (R. 683). He worked upon records of the Commercial National Bank in connection with the audit he prepared "in this case" (R. 683, 684). He couldn't say specifically, but "*probably in connection with some of the loans which I have testified to today*" (R. 684). He did not have his notes of the audit of Commercial National Bank and he did not know where they were (R. 684). Referring to his work sheets, he said, "I imagine it is up to the United States Attorney to see them". (R. 684).

The Commercial National Bank is not a corporation named in the indictment, nor is it mentioned in the bill of particulars, and, *more important, not one witness identified a book or record of that bank and not one such book or record was offered or received in evidence.*

The residium of Schroeder's testimony is this: the witness audited many books and records, some

of which were in evidence and some were not. The witness selected such portions of that audit as, in his opinion, suited his notion of the case for the Government. Thus he became the judge of its relevancy, but when defendants' counsel sought to test that relevancy in connection with his audit of the books and records of the Commercial National Bank, he did not have his audit notes (R. 684). Counsel for the Government dismiss these assignments of error, speaking metaphorically, with flourish of the hand, but the conclusion follows from the whole testimony of Schroeder that his audit and his testimony based thereon were not in part at least confined to books and records in evidence or before the Court.

TENTH

(Appellee's Brief, p. 23)

Admission in evidence of the Perry mortgage (Exhibit 170, R. 547, 548) and the sheriff's deed (Exhibit 172, R. 551, 552) are still unjustified by counsel for the Government. They say (p. 24) they were not offered to show that no title was received by the Blackburn deed (Exhibit 144, R. 517). Since all these exhibits embraced identical property, then the manifest purpose of the Blackburn deed was to show that Blackburn conveyed property to the Arizona Holding Corporation which Perry mortgaged to the Yavapai County Savings Bank. No other reason supports the introduction of the Blackburn deed in evidence.

Counsel for the Government say that the purpose of the evidence was to show, that when the

property was deeded to A. E. Reyburn, she mortgaged the property back to the grantor, which in turn assigned it to Security Building & Loan Association and that the Reyburn mortgage was not a first mortgage as represented by defendants (Appellee's Brief, p. 24). Strange, indeed, is this statement. The deed to Reyburn (Exhibit 141, R. 512) and the Reyburn mortgage (Exhibit 142, R. 514) and the assignment of this mortgage (Ex. 143, R. 516) embrace the identical property described in the Blackburn deed (Exhibit 144, R. 517). Otherwise it is pertinent to inquire, Why was the Blackburn deed introduced in evidence?

Government counsel assert that the Reyburn mortgage (Ex. 142, R. 514) "was not a first mortgage as represented by appellants" (p. 24). How did the Government prove that statement? Simply by showing that a party by the name of Perry mortgaged property to Yavapai Savings Bank (R. 547, 548) which Blackburn deeded to Arizona Holding Corporation (R. 516, 517). Blackburn did not testify, although his deed was introduced over objection by defendants (R. 516, 517). Perry did not testify either. His mortgage to Yavapai Savings Bank was received in evidence upon testimony of the Secretary of the bank that the bank "took a mortgage on the property described in Government's Exhibit 170 for identification, being a mortgage signed by William Perry. "I recognize his signature" (R. 547). That is the limit of the testimony. It does not prove that Perry owned the property mortgaged. It does not prove that Blackburn did not own it. It does not competently prove that the "Reyburn mortgage was not a first mortgage", as stated by counsel for the Government (p. 24). The

Exhibit was inadmissible for every reason stated in the objection to it (R. 547).

ELEVENTH

(Appellee's Brief, p. 25)

Counsel for the Government by this section of their brief leave unanswered Assignment XXVIII (Appellants' opening brief, p. 94) relating to the hearsay testimony of the witness York unless statements like "It may well be the understanding of the witness" and "In view of ths overwhelming proof of the guilt of the defendants" (Appellee's Brief, p. 26) are permitted to be substituted for the law which applies to the record before us. It is hardly fair to the defendants for Government counsel to meet the impact of this error by excusing it with sentences of transfiguration.

TWELFTH

(Appellee's Brief, p. 26)

After reading the argument under this division of appellee's brief, we still cannot understand why Government's witness Fierstone should have been permitted to testify concerning the accounting practices between the Security Building & Loan Association and Century Investment Corporation, and then deny to defendants' witness Crane the opportunity to testify on the same subject (R. 834, 835). Counsel for the Government now approach the question upon a different theory than they did below. They now say the question was not sufficiently broad to meet the requirements of a hypothetical question and

left too much to the imagination of the witness (Appellee's Brief, p. 26). That was not the basis of their objections below (R. 834, 835). Then they thought it called for a conclusion and invaded the province of the jury.

THIRTEENTH

(Appellee's Brief, p. 27)

Counsel for the Government say the term "affirmative act" employed by the trial court in its charged to the jury "is neither a legal nor a technical term" (p. 27). Then Judge Wilbur, by comparison, was wrong when he said that the term "proper warning" was a term that required definition (*Young vs. Southern Pacific Co.*, 182 Cal. 369, 190 Pac. 36, 41). We prefer to follow Judge Wilbur.

In respect to the refusal of the trial court to nstruct upon the failure of proof concerning the ndictment allegation of paid in capital stock of $300,000.00, the question is not answered by saying he trial court instructed the jury that the indictment should not be considered as evidence (Appellee's Brief, p. 26). Thus, accepting that postulate, we have the anomaly that, since the defendants are harged with criminal misrepresentation that the aid in stock of the Security Building & Loan Association was $300,000.00, whereas it was only $45,000.00 (R. 5, 6), then the failure of proof of this damaging allegation is compensated by the charge o the jury that the indictment should not be considered as evidence. Even after the charge in this espect, this allegation was still left in the indictment and it was still before the jury.

The difference between $300,000.00 and $45,000.00 paid in capital stock was sufficiently important, involving as it does criminal fraud, that it should have been eliminated beyond any possibility of consideration by the jury.

Counsel for the Government do not take issue with the statement of counsel for the defendants that, whereas exception to the refusal to give this requested instruction was saved, it was inadvertently omitted from the bill of exception (Appellants' Brief, p. 106). In view of the seriousness of the error, we respectfully request the Court to consider this assignment of error.

FOURTEENTH

(Appellee's Brief, p. 28)

Counsel for the Government here confuse the schemes with the physical acts of mailing. The difference is important.

This amazing statement appears in the brief of counsel for the Government, speaking of co-schemers:

> "He may not know what his partners are doing but he is bound by their acts". (p. 29).

The cases cited support no such statement, and it is at war with every concept of American jurisprudence. The indictment itself, in respect to the mailing of the indictment letters, alleges that defendants did such acts "knowingly" (R. 611, 612, 618, 620, 622, 624, 625, 630, 633, and 635).

The testimony of the witness Perkins quoted by

counsel for the Government (Appellee's Brief, p. 31) hows defendants' connection with the corporations n point of time. It parallels the testimony of the Government's witness Hobbs, who was an officer f the corporation (R. 582). Perkins himself tes- ified:

> "The orders for the Tucson office came from the Phoenix office when Archie was here * * * came from Jesse H. Shreve, Archie Shreve or when Dan Shreve was here". (R. 636).

> "At the time Archie Shreve was here he was in the same capacity, as far as I was concerned, as Dan was *afterwards.* When Dan came over he stepped in where Archie left off, which was in the first part of January, 1930. Then Archie stepped out of the picture and Dan moved in". (R. 638).

Every indictment letter was mailed in 1931 and ince Perkins, as appears above, testified that Dan ame over in the first part of January 1930, obvi- usly the letters were mailed during the adminis- ration of the affairs of the corporations by Dan Shreve, Perkins and Hobbs.

We repeat, as we stated in the opening brief, hat the evidence of mailing is not sufficient to rove beyond a reasonable doubt that the defendants Jesse H. Shreve and Archie Shreve mailed the in- dictment letters, or knew that they were mailed.

CONCLUSION

The errors assigned, and arguments predicated

thereon, as set forth in appellants' opening brief, have not been met by the brief of Government counsel. The law of the case is virtually conceded by Counsel for the Government, and, as between all counsel, the facts are singularly free from dispute.

For all the reasons now before the Court, defendants again respectfully request that the relief prayed for in their opening brief be granted.

Respectfully submitted,

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GEORGE H. SHREVE,
Washington Building,
Los Angeles, California
On the Brief.

No. 8781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSE H. SHREVE and
ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR REHEARING AND APPLICATION FOR STAY OF ISSUANCE OF MANDATE AND AFFIDAVIT IN SUPPORT THEREOF

LESLIE C. HARDY
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TABLE OF AUTHORITIES CITED

CASES

TEXT BOOKS AND STATUTES

UNITED STATES CONSTITUTION

No. 8781

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TO THE HONORABLES, Francis A. Garrecht, Bert Emory Haney and Albert Lee Stephens, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants herein respectfully petition this Honorable Court for a rehearing of this cause, and for grounds thereof say:

I.

ASSIGNMENT OF ERRORS VIII TO XII, INCLUSIVE (BRIEF OF APPELLANTS, PPS. 41 TO 47, FIFTH SPECIFICATION PPS. 40-41) RE-

LATE TO THE ADMISSION IN EVIDENCE OF EXEMPLIFIED COPIES OF DEEDS, MORTGAGES, AND ASSIGNMENTS OF MORTGAGES. THESE ASSIGNMENTS OF ERROR ARE DISPOSED OF BY THE COURT AT PAGES 17 TO 20, INCLUSIVE, OF THE OPINION. THIS COURT ERRED IN DECIDING THAT THESE EXEMPLIFIED COPIES OF DEEDS, MORTGAGES, AND ASSIGNMENTS OF MORTGAGES WERE ADMISSIBLE IN EVIDENCE UNDER THE PROVISIONS OF SECTION 906 OF THE REVISED STATUTES (28 USCA, SEC. 688).

Appellants contend that the last mentioned statute (28 USCA, Sec. 688) has no application whatever to the exemplified copies of the deeds, mortgages and assignments of mortgages which were introduced in evidence by the Government against appellants, all of which are referred to in Assignments of Error VIII to XII, inclusive. The correct decision of this question is important to appellants. It is also important because it announces a rule of law which we believe is not only contrary to the statute itself, but also contrary to decisions of courts which have construed the statute, including the Supreme Court of the United States.

We have shown in the Brief of Appellants, beginning at pages 47 to 69, inclusive, that these deeds, mortgages, and assignments of mortgages were *an indispensable part of the case* for the Government. Their effect, after they were admitted in evidence, was so prejudicial that it is essential that it be determined beyond possibility of doubt that these instruments were properly admitted.

Section 688, 28 USCA, reads as follows:

"*Proofs of records in offices not pertaining to courts.* All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any *other* state or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the *said records* and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory or country, as aforesaid, from which they are taken."

The Supreme Court of the United States in *Atchison T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. Rep. 397, 53 L. Ed. 695, has held that Section 688, *supra*, was enacted for the purpose of giving effect to Section 1, Article IV of the Constitution. We tried to point this out at pages 9 and 10 of Appellants' Reply Brief. Lest there be any mistake, we quote from the *Sowers* case, beginning at page 64 of the U. S. Reports:

> "*To make effectual* the full faith and credit clause of the Constitution (Art. IV, Sec. 1) Congress passed the act of May 26, 1790, 1 Stat. 122, c. 11. This act made provision for the authentication of the records, judicial proceedings and acts of the legislatures of the several States, and provided that the same should have such faith and credit given them in every State within the United States as they have by law or usage in the courts of the State from which the records are or shall be taken. This act did not include the Territories.
>
> "On March 27, 1804, Congress passed an act extending the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the Territories of the United States and countries subject to the jurisdiction thereof. 2 Stat. 298, c. 56. Those statutory enactments subsequently became Sections 905 and 906 of the Revised Statutes. Section 905 applies to judicial proceedings, and Section 906 to records, etc., kept in offices not pertaining to courts. * * *."

The Supreme Court of Georgia, in the case of

Slaten v. Hall, 172 Ga. 675, 158 S. E. 747, said:

> "Section 688, tit. 28 of the U. S. Code Annotated, which was created to carry into effect Article IV, Section 1, of the Federal Constitution * * *."

Section 1 of Article IV of the Federal Constitution provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every *other* State. And the Congress may by general Laws prescribe the Manner in which *such* Acts, Records and Proceedings shall be proved, and the Effect thereof."

It will be observed that the constitutional provision provides that full faith and credit shall be given in each state to records *of every other state*, that is to say, foreign records. Section 688, *supra*, was enacted to carry into effect this constitutional provision in conformity with the last sentence of Section 1 of Article IV. Section 688 plainly provides that "all records * * * which may be kept in any public office of any state * * * not appertaining to a court * * * shall be admitted in any court * * * in any *other state*."

These deeds, mortgages and assignments of mortgages are not public records of another state, but they are records of public offices *within* the state of Arizona, which in this case is the state of the forum. Thus the statute itself points out the error of the Court in deciding that these deeds, mortgages and

assignments of mortgages were properly admitted in evidence.

The last sentence of Section 688 does not change the purpose and effect of the statute, because the last sentence which begins "And the *said records* * * *" must refer to the records mentioned in the first sentence of the statute.

Undoubtedly Section 688 refers only to foreign records. See note to *Wilcox v. Bergman* (Minn.) 5 L.R.A. (N.S.) 938. At page 945 of this note, the author cites *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437. That decision construed 1 Statutes at Large, Section 122, from which is derived R. S. Sec. 905 (Title 28, USCA, Section 687). This section differs only from Section 688 in that it pertains to legislative acts and judicial records. The *Turnbull* decision clearly discloses that the act there construed referred only to foreign records. See also *Adam v. Saenger*, 303 U. S. 59, 82 L. Ed. 649. The last mentioned case conclusively shows that R. S. 905 (28 USCA, Section 687) was enacted to carry into effect the full faith and credit clause of the Constitution, namely, Article IV, Section 1. Since Sections 687 and 688, Title 28, USCA, differ only in respect to the character of the records therein referred to *(A. T. & S. F. Ry. Co. v. Sowers, supra)*, it seems indisputable that both sections refer only to records of other states *and not to records of the state of the forum, as these here are.*

We had thought, as we said in the reply brief, that *Myres v. U. S.* (CCA 5) 256 Fed. 779, cited in the opinion, discussed a rule of procedure rather than a rule of evidence, but if we are mistaken, nevertheless

we contend that Section 688, as construed by the Supreme Court in the cases above cited, following Section 1 of Article IV of the Constitution, relates only to records of a state *other* than the state in which they are utilized. In its true application Section 688 applies to *foreign* records and not records of the state of the *forum.*

If we are correct in our contention, then we submit the Court has grievously erred in its opinion in this respect. If the Court concludes it has erred, then we respectfully urge that appellants are entitled to have these assignments of error (VIII to XII, inclusive) re-examined, as well as the argument and law presented in support thereof.

This Honorable Court, in quoting from the *Myres* case, *supra,* (page 19 of the Opinion) says:

> "It (Section 688) provides that such certified records 'shall have such faith and credit given to them in every court and office of the United States as they have by law or usage in the courts or offices of the state, territory or country as aforesaid, from which they were taken.' The effect of this provision is not an adoption of the rules of practice as to the preliminaries necessary to the introduction of certified records fixed by the state statutes but to give to such certified copies, when introduced, the like faith and credit that they are accorded in the courts of the state."

In the first place, in the *Myres* case, the Court had under consideration *a rule of practice* under the Texas law with reference to filing certified copies of

instruments before trial and notice to adverse parties of such filing. In Texas, where the case was tried, the state law required that certified copies should be filed three days before the trial and that notice of the filing be given to the adverse party. That situation is not analagous to the situation here, assuming that the *Myres* case correctly interprets Section 688, which we claim it does not. In the case at bar the lower court admitted in evidence exemplified copies of alleged deeds and mortgages *not taken from other states, but recorded within the state of the forum.* We contend as seriously as we know how that these exemplified copies should be admitted not under Section 688, which relates solely to the records of states *other* than the forum, but under the laws of *the forum,* i.e. the laws of Arizona. (See Brief of Appellants, and cases cited therein on pages 50 to 58, inclusive.) If these exemplified copies are not governed by federal statute, and we are sure they are not, then under the authorities cited in our opening brief, this Honorable Court must go to the laws of Arizona to determine the proof necessary to lay the foundation for the admissibility of these copies.

If the Court please, the quotation from the *Myres* case and the statute itself, definitely states (even if the statute were applicable) that they (the exemplified copies) shall be given such credit "as they have by law or usage in the courts of the state from which they are taken." So even if the statute by some method of reasoning is held to be applicable to cases tried in the forum where the exemplified copies originate, then they have to be introduced according to the law or usage in the court of the forum, i.e., Arizona. In short, using the last quoted portion of the *Myres*

case, they would not be afforded any faith or credit unless the proper foundation were laid. (See Arizona cases cited in our opening brief).

There would seem to be no question as to their inadmissibility under the laws of Arizona without the foundation first being laid. These exemplified copies are not primary evidence—they are at best secondary and, of couse, some showing should be made that the originals cannot be procured or that such deeds and mortgages were in fact executed (Jones on Evidence 4th Ed. Vol. 2 page 999, par. 523). There have been many cases where forged deeds and mortgages have been offered for recordation and actually recorded. This Court, of course, cannot take judicial knowledge that these mortgages and deeds were actually executed by the defendants or under their direction. The burden of proof cannot thus be shifted to defendants. The jury should not be permitted to guess as to the authenticity of these documents. Whatever else may be said, we are confident that this Honorable Court inadvertently misconstrued the purpose and effect of Section 688. Without these deeds and mortgages the Government has no case in the first instance, and even if it had a case, the bulk of the charge in the indictment is built around and sought to be proven by the introduction of these so necessary documents. That their admission is highly prejudicial goes without saying.

The same situation applies to the York mortgage (See page 95, Brief of Appellants). We need but call attention to this Court's opinion (page 26), wherein it is said:

> "The appellants contend the testimony of York was hearsay as to the defendants, and, therefore, inadmissible, *but, in view of the production of the exemplified copies of the mortgage, and of the deed* the connection between the letter of the daughter and two of the companies named in the indictment was established and testimony relative thereto was admissible."

Thus, it will be seen that the admission of this hearsay testimony is justified by the production of the *exemplified* copy of the mortgage from York and his wife to Security Building and Loan Association (Record 562). No foundation was laid for the admission of the exemplified copy of this mortgage and therefore it falls within the same category as the other exemplified copies of mortgages which we have discussed in this subdivision of this Petition for Rehearing. No foundation was even laid as provided at common law.

There is not one word of proof in the record that these defendants prompted the letter from York's daughter to him, or that these defendants knew that such a letter was written, or that they knew York and his wife executed and delivered a mortgage to Security Building and Loan Association. York's daughter testified (Record 560-562) that her husband (who is the co-defendant Perkins to whom a severance was granted and who testified against these defendants) had something for York to sign, which was the mortgage in question.

Undoubtedly, as appears from this testimony, Perkins was the originator of this fraudulent scheme and not these defendants. In view of this state of the

record, therefore, it appears obvious that this testimony was erroneously admitted. That it was prejudicial to these defendants is undeniable.

The same may be said as to Government's Exhibit 145, being an exemplified copy of a warranty deed allegedly executed by Arizona Holding Corporation, by A. C. Shreve, Vice-President, and Glen O. Perkins, Assistant Secretary, to A. E. Rayburn (Page 25, Opinion).

We feel convinced that this Honorable Court, upon a reconsideration of Section 688, will hold that it is not applicable here and that the evidence should not have been admitted without a proper foundation being laid, as provided by the statutes and the decisions of the highest court in Arizona.

II.

ASSIGNMENTS OF ERROR XIII TO XVI, IN-

SUPREME COURT OF THE UNITED STATES IN CHAFFEE & CO. v. U. S., 18 WALL. 516, 21 L. ED. 908.

> "The appellants contend the testimony of York was hearsay as to the defendants, and, therefore, inadmissible, *but, in view of the production of the exemplified copies of the mortgage, and of the deed* the connection between the letter of the daughter and two of the companies named in the indictment was established and testimony relative thereto was admissible."

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There is no proof in the record that these defendants prompted the letter addressed to York by his daughter, or that they knew such a letter was written, or that they knew York and his wife executed and delivered a mortgage to Security Building and Loan Association. York testified that his daughter wrote him (Record 560-562) that the company with which her husband (Perkins) was connected, had something for York to sign, which was the mortgage in question. Perkins was a co-defendant who was granted a severance and who testified against appellants.

Undoubtedly, as appears from this testimony, Perkins was the originator of this fraudulent scheme and not these defendants. In view of this state of the

record, therefore, it appears obvious that this testimony was erroneously admitted. That it was prejudicial to these defendants is undeniable.

The same may be said as to Government's Exhibit 145, being an exemplified copy of a warranty deed allegedly executed by Arizona Holding Corporation, by A. C. Shreve, Vice-President, and Glen O. Perkins, Assistant Secretary, to A. E. Rayburn (Page 25, Opinion).

We feel convinced that this Honorable Court, upon a reconsideration of Section 688, will hold that it is not applicable here and that the evidence should not have been admitted without a proper foundation being laid, as provided by the statutes and the decisions of the highest court in Arizona.

II.

ASSIGNMENTS OF ERROR XIII TO XVI, INCLUSIVE (BRIEF OF APPELLANTS, PAGES 68 TO 73, INCLUSIVE, EIGHTH SPECIFICATION, PAGE 68) RELATE TO THE ADMISSION IN EVIDENCE OF RECORDS OF FIRST NATIONAL BANK OF PRESCOTT, ARIZONA. THESE ASSIGNMENTS OF ERROR ARE DISCUSSED BY THE COURT AT PAGES 21 TO 24, INCLUSIVE, IN THE OPINION. THIS COURT ERRED IN DECIDING THAT THESE RECORDS WERE HARMLESS AND THAT THEY WERE ADMISSIBLE IN EVIDENCE UNDER ANY DECISION CONTRARY TO THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN CHAFFEE & CO. v. U. S., 18 WALL. 516, 21 L. ED. 908.

It is difficult to understand how this Honorable Court can conclude that the admission in evidence of these records of the First National Bank of Prescott was harmless. The trial court and counsel for the Government assuredly did not think so, because the record discloses that the Government utilized the witnesses Trott, Evans and Faulkner to identify these records and the transcript discloses that their testimony and these records embrace some fifty pages (See Transcript of Record, pages 294 to 343, Inc.,) It was impossible for appellants to assign as error all this testimony and the admission in evidence of all these records because of the limitation which this Court has placed upon the number of assignments of error.

As one factual illustration of the error of this Court in deciding that the admission in evidence of these records was harmless, we point out to the Court that three notes for $10,000.00 each were signed by Joseph E. Shreve, Glen O. Perkins and J. G. Cash, and endorsed by the defendant Jesse H. Shreve (Record 311). Not one of those notes was introduced in evidence. The Court itself concedes this to be a fact (Op. 22). But, more important than this, and as proof of the fraud alleged in the indictment, these personal notes of Joseph S. Shreve, Glen O. Perkins and J. G. Cash, *which were endorsed by the defendant Jesse H. Shreve*, were paid by funds of Security Building & Loan Association, one of the corporations named in the indictment and around which most of the fraudulent acts charged in the indictment gravitated. We submit, Your Honors, that evidence of this character cannot be harmless.

The rule of law announced in the case of *Chaffee & Co. v. U. S., supra,* does not admit of the introduction of these records of First National Bank of Prescott against these defendants. This is particularly true, because (1) the record affirmatively shows that these defendants had no connection whatever with the First National Bank of Prescott; because (2) the First National Bank of Prescott is not mentioned in the indictment; and because (3) the First National bank of Prescott is not mentioned in the Bill of Particulars; because (4) there is no proof in the record that defendants, or either of them, had any control or supervision of the records of that bank.

Now, if it can be logically and lawfully asserted that, notwithstanding what we have said, as supported by the bill of exceptions, that these records of a banking association wholly disassociated from these defendants were properly admitted in evidence under the decision in *Wilkes v. U. S.*, 80 Fed. (2d) 285, decided by this Court, then we contend that that case has *overruled* the decision of the Supreme Court of the United States in *Chaffee & Co. v. U. S., supra.* If this Court in the *Wilkes* case has not expressly overruled the decision of the Supreme Court in the *Chaffee* case, then certainly in its application to this case, the rule of law announced there by the Supreme Court of the United States has been refined away.

This Honorable Court says at page 23 of the Opinion, that "It was believed, in an earlier age, that books of third parties were not admissible in evidence upon the ground of *res inter alios acta,* but there is a broader view now taken and the rule is somewhat relaxed * * *". If that rule is relaxed it has been

relaxed by this Court and not by the Supreme Court of the United States.

But more than that, this Court at page 24 of the Opinion quotes from the former opinion in this case (77 Fed. (2d) 2, 7) to the effect that it was then laid down as a rule of decision on the *retrial* of this case, that in order to make these books of the First National Bank of Prescott admissible against these defendants that "it is *essential* to show that the defendants made such entries or caused them to be made, or assented thereto." The record in this case shows no such thing.

Now, it seems to us, and respectfully of course, that this Court by the present opinion not only has refined away a rule of evidence as laid down by the Supreme Court of the United States, but that it has wholly retracted a rule of decision which was made by this Court on the former appeal and upon which these defendants were entitled to rely upon this trial of the case. In a criminal case there certainly should be more security than this with respect to a rule of evidence projected by this Honorable Court for the benefit of defendants and upon which they were entitled to and did rely.

III.

ASSIGNMENTS OF ERROR XXVI AND XXVII (BRIEF OF APPELLANTS 87 TO 89, INCLUSIVE, TENTH SPECIFICATION, PAGE 87) RELATE TO THE ADMISSION IN EVIDENCE OF A MORTGAGE EXECUTED BY WILLIAM H. PERRY, AND A SHERIFF'S DEED EXECUTED PURSUANT TO THE FORECLOSURE OF THAT

MORTGAGE. THESE ASSIGNMENTS OF ERROR ARE DISPOSED OF BY THE COURT ON PAGE 25 OF THE OPINION. THE COURT ERRED IN DECIDING THAT THE PERRY MORTGAGE AND THE SHERIFF'S DEED WERE ADMISSIBLE IN EVIDENCE.

Perry, as the Opinion discloses, executed a mortgage to the Yavapai County Savings Bank. Neither that bank nor the mortgage is mentioned in the indictment or in the bill of particulars. The witness Russell testified with respect to the mortgage and the sheriff's deed. Perry did not testify and neither did the sheriff. The defandants had no connection whatever with the Yavapai County Savings Bank and as far as the record discloses *they never knew such a bank existed.* The effect of Russell's testimony was to show, as the opinion discloses (Page 25), that the property which was mortgaged by Perry to Yavapai County Savings Bank was the same property described in Exhibit 145, which was an *exemplified copy* of a warranty deed executed by *Arizona Holding Corporation* to A. E. Rayburn.

Here again, with respect to damaging testimony, exemplified copies of instruments were introduced in evidence, without the Government laying any foundation whatever for their admission.

But more than this, a fraudulent transaction was proved by records of a person and a bank over which the defendants had no *control or connection* whatever. Insofar as this record discloses they never knew that Perry had executed a mortgage to Yavapai County Saving Bank.

We submit, Your Honors, that these assignments of error violate every reason supporting the rule against hearsay evidence. We can conceive, as stated by the Court, why it is not "impressed with our argument" (Opinion, page 25) but we are unable to understand why the Court is not impressed with our authorities (Appellants' Brief, pages 91 to 93). It seems to us, in view of the assignments of error, and the record, that it should be unnecessary to cite authorities to support assignments of error that the admission of testimony and evidence of this character is violative of every reason for the rule against hearsay evidence, particularly in criminal cases.

IV.

We have noted this statement of the Court:

> "However puzzling may have proven some of the problems presented in the preceding pages, this particular argument (i.e., the sufficiency of the evidence) precipitates no mystery. The record overflows with proof of appellants' guilt."

Undoubtedly that appraisal by the Court has magnified the difficulties which appellants have encountered to convince this Court that the misapplication of wholesome principles of law often require that judgments be reversed notwithstanding guilt. If, as we think is the case here, rules of evidence which have long been recognized and often applied are to be discarded, but if not discarded refined away, then appellants are singularly deprived of rights which they thought they could rely upon. We feel that the errors which we have pointed out in this Motion for a Rehearing are sufficiently substantial and important, at least to those who will follow, that this Court

should again re-examine the assignments of error pertaining to them. It is not our purpose to request this Court to again re-examine all the assignments of error, and the whole brief in connection with them, but we do believe that this Court has committed fundamental error in the following respects:

(1) That it has misconstrued 28 USCA, Sec. 688, by holding that the deeds, mortgages, and assignments of mortgages, discussed in Subdivision I hereof, were admissible in evidence.

(2) In deciding that the records of First National Bank of Prescott, discussed in Subdivision II hereof, were admissible in evidence, and that they were harmless.

(3) In deciding that the Perry mortgage executed to Yavapai County Savings Bank, and the Sheriff's Deed on foreclosure thereof, and the testimony of the witness Russell in relation thereto, discussed in Subdivision III hereof, were admissible.

CONCLUSION

For all the foregoing reasons, it is respectfully contended that a rehearing of this cause be granted and that, if it comports with the wishes of the Court, these appellants be permitted to brief additionally the questions raised by this Motion for Rehearing, and that they be permitted to have oral argument thereon.

Respectfully Submitted,

LESLIE C. HARDY,

LOUIS B. WHITNEY.
Attorneys for Appellants and Petitioners.

No. 8781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSE H. SHREVE and
ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

TO THE HONORABLES, FRANCIS A. GARRECHT, BERT EMORY HANEY, AND ALBERT LEE STEPHENS, JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

I.

That on the 18th day of April, 1939, this Honorable Court rendered and entered its opinion herein by which it affirmed the judgment of the United States District Court for the District of Arizona, from which petitioners had duly and regularly appealed.

II.

That petitioners intend to and will petition the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of this Honorable Court and will file said Petition for said Writ of Certiorari in the Supreme Court of the

United States within thirty (30) days after the entry of the judgment of this Honorable Court following the final determination of the Petition for Rehearing which has been filed herein by the petitioners in the event said Petition for Rehearing is denied, and that they will in all respects comply with the rules of the Supreme Court of the United States regulating the filing of petitions for writs of certiorari therein.

III.

The undersigned counsel for petitioners believe that good and sufficient reasons exist for the issuance by the Supreme Court of the United States of a Writ of Certiorari, in the event said Petition for Rehearing is denied, and the final judgment of this Court is rendered and entered, as said reasons are provided by law and by the rules of the Supreme Court of the United States.

WHEREFORE, petitioners pray that this Honorable Court stay its mandate herein until said Petition for Rehearing is disposed of and said Petition for Writ of Certiorari shall have been filed in the Supreme Court of the United States.

Respectfully submitted,

LESLIE C. HARDY,

LOUIS B. WHITNEY.
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

We, the undersigned, counsel for appellants and petitioners herein, do certify that in our opinion the foregoing Petition for a Rehearing is well founded and meritorious and that neither said petition or said Application for Stay of Issuance of Mandate are interposed for the purpose of delay.

LESLIE C. HARDY,

LOUIS B. WHITNEY.
Attorneys for Appellants and Petitioners.

No. 8781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSE H. SHREVE and
ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

AFFIDAVIT OF JESSE H. SHREVE AND ARCHIE C. SHREVE, APPELLANTS AND PETITIONERS, IN SUPPORT OF APPLICATION FOR STAY OF ISSUANCE OF MANDATE.

UNITED STATES OF AMERICA
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
} ss.

JESSE H. SHREVE and ARCHIE C. SHREVE, first being sworn, upon oath depose and say:

That they are the appellants and petitioners herein and make and file this affidavit in support of their Application for Stay of Issuance of Mandate herein.

Affiants depose and say that they, through their counsel, Leslie C. Hardy, Esq. and Louis B. Whitney, Esq., will file in the Supreme Court of the United States a Petition for a Writ of Certiorari to review the opinion of this Honorable Court rendered and filed herein on the 18th day of April, 1939, in the event their Petition for Rehearing filed herein is denied and final judgment is entered herein affirm-

ing the judgment of the United States District Court for the District of Arizona.

Affiants further depose and say that neither said Petition for Rehearing, nor said Application for Stay of Issuance of Mandate, nor said Petition for Writ of Certiorari, in the event a Petition for Writ of Certiorari is filed in the Supreme Court of the United States, are interposed for the purpose of delay, but that they are interposed solely in order that affiants may enforce the rights and remedies accorded to them by the Constitution and laws of the United States, the rules of this Court, and the rules of the Supreme Court of the United States in order to preserve their liberty.

JESSE H. SHREVE,

ARCHIE C. SHREVE.

Subscribed and sworn to before me this ..... day of May, 1939.

.....

Notary Public

My commission expires:

Service of two copies of the within Petition for Rehearing, Stay of Issuance of Mandate, and Affidavit of Jesse H. Shreve and Archie C. Shreve in support of Application for Stay of Issuance of Mandate, is admitted this ..... day of May, 1939.

FRANK E. FLYNN,
United States Attorney.

By.....

No. 8768

United States Circuit Court of Appeals

For the Ninth Circuit.

BEN A. BOST,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8768

United States

Circuit Court of Appeals

For the Ninth Circuit.

BEN A. BOST,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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INDEX.

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Index

No. 8768

United States

Circuit Court of Appeals

For the Ninth Circuit.

BEN A. BOST,

Appellant,

vs.

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NAMES AND ADDRESSES OF ATTORNEYS.

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ROBERT A. ZARICK, Esq.,
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Sacramento, Calif.
Attorneys for Defendant and Appellant.

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U. S. Attorney, Northern District of California,
Post Office Bldg.,
San Francisco, Calif.
Attorney for Plaintiff and Appellee.

No. 25961-S.

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

First Count: (18 U. S. C. A. Sec. 80);

In the March 1937 term of said Division of said District Court, the Grand Jurors thereof, on their oaths present:

I. That BEN A. BOST on or about the 6th day of April, 1934, at San Francisco, California, in said Division and District, knowingly and wilfully falsified, concealed and covered up by a trick, scheme and device, a material matter within the

jurisdiction of a department and agency of the United States, all as hereinafter set forth.

II. Under the regulations duly issued and promulgated by the Secretary of the Treasury on January 31, 1934, under and pursuant to the authorization given under the provisions of the "Gold Reserve Act of 1934", it was at all times herein mentioned provided that the United States Mints shall not purchase any gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof and which gold shall not, at the time of its purchase, have [1*] entered into monetary or industrial use, unless such gold is accompanied by a properly executed affidavit in the form therein prescribed. Under said regulations it was at all of said times further provided therein that persons offering gold of the kind above described to the Mint for sale, shall execute and present to the Mint with said gold so offered, an affidavit on a form prescribed by said Regulations; that in the case of gold so tendered for sale and so deposited by persons who have recovered said gold by mining or panning, said regulations require that the affidavit to be used and executed is an affidavit therein referred to as being on Form "TG 19" which said form is supplied by the Mint to all persons who offer such gold to a United States Mint for sale. That said form of affidavit "TG 19" provides that all persons who offer such gold to any United States Mint for sale shall set forth therein

*Page numbering appearing at the foot of page of original certified Transcript of Record.

certain information, including the source of said gold and the name and location of the mine or placer deposit from which said gold has been recovered.

III. That on or about the 6th day of April, 1934, said defendant requested of the Mint of the United States, located at San Francisco, California, which was then and there an agency of the Treasury Department of the United States, that it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose of inducing said Mint to purchase said gold, and in purported compliance with said regulations above mentioned, said deposit of gold was accompanied by an affidavit executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit "A", and made a part hereof; that in and by the terms of said affidavit, said defendant wilfully, knowingly and unlawfully, and contrary to his oath in said affidavit taken, declared, certified and swore to certain material matters which were not [2] true and which he did not believe to be true when he swore to said affidavit, to-wit: That he was the owner of a mining claim called the "Lucky Gravel" claim, and that the source of said gold so tendered and deposited was "Lucky Gravel claim, mostly small nuggets", and that said gold had been recovered from said claim, which claim it was stated in said affidavit was located in Cougar Canyon, Eldorado County, California, whereas in truth and in fact as said defendant then and there well knew,

he was not the owner of any mining claim in said County and State, known as or called the Lucky Gravel claim, and whereas in truth and in fact the source of said gold was not said Lucky Gravel claim, and said gold had not been recovered from said alleged claim, which facts said defendant at all times well knew.

Second Count: (18 U. S. C. A., 80.)

And the said Grand Jurors on their oaths aforesaid, do further present:

I. That Ben A. Bost, on or about the 17th day of May, 1934, at San Francisco, California, in said Division and District, knowingly and wilfully falsified, concealed and covered up by a trick, scheme and device, a material matter within the jurisdiction of a department and agency of the United States, all as hereinafter set forth.

II. The Grand Jurors do hereby adopt the allegations of paragraph II of the First Count of this Indictment and do hereby make the same a part hereof as fully as if the same were set out herein.

III. That on or about the 17th day of May, 1934, said defendant requested of the Mint of the United States, located at San Francisco, California, which was then and there an agency of the Treasury Department of the United States, that [3] it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose of inducing said Mint to purchase said gold, and in purported compliance with said regulations above

mentioned, said deposit of gold was accompanied by an affidavit executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit "B", and made a part hereof; that in and by the terms of said affidavit, said defendant wilfully, knowingly and unlawfully, and contrary to his oath in said affidavit taken, declared, certified and swore to certain material matters which were not true and which he did not believe to be true when he swore to said affidavit, to-wit: That he was the owner of a mining claim called "The Lucky Gravel Claim," and that the source of said gold so tendered and deposited was "gravel gold, small nuggets", and that said gold had been recovered from said claim, which claim it was stated in said affidavit was located in Cougar Canyon, El Dorado County, California, whereas in truth and in fact, as said defendant then and there well know, he was not the owner of any mining claim in said County and State, known as or called "The Lucky Gravel Claim", and whereas in truth and in fact the source of said gold was not said "Lucky Gravel Claim", and said gold had not been recovered from said alleged claim, which said facts said defendant at all times well knew.

Third Count: (18 U. S. C. A., 80.)

And the said Grand Jurors on their oaths aforesaid do further present:

I. That Ben A. Bost, on or about the 18th day of April, 1935, at San Francisco, California, in said Division and District, knowingly and wilfully falsi-

fied concealed and covered up by a trick, scheme and device, a material matter within the jurisdiction of a [4] department and agency of the United States, all as hereinafter set forth.

II. The Grand Jurors do hereby adopt the allegations of paragraph II of the First Count of this Indictment and do hereby make the same a part hereof as fully as if the same were set out herein.

III. That on or about the 18th day of April, 1935, said defendant requested the Mint of the United States, located at San Francisco, California, which was then and there an agency of the Treasury Department of the United States, that it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose of inducing said Mint to purchase said gold, and in purported compliance with said regulations above mentioned, said deposit of gold was accompanied by an affidavit executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit "C", and made a part hereof; that in and by the terms of said affidavit, said defendant wilfully, knowingly, and unlawfully, and contrary to his oath in said affidavit taken, declared, certified and swore to certain material matters which were not true and which he did not believe to be true when he swore to said affidavit, to-wit: That he was the owner of a mining claim called "The Lucky Gravel Claim", and that the source of said gold so tendered and deposited was said "Lucky Gravel Claim", and that said gold had been recovered from said claim

in Cougar Canyon, El Dorado County, California, whereas in truth and in fact as said defendant then and there well knew, he was not the owner of any mining claim in said County and State, known as or called "The Lucky Gravel Claim", and whereas in truth and in fact the source of said gold was not said "Lucky Gravel Claim", and said gold had not been recovered from said alleged claim, which said facts said defendant at all times well knew. [5]

Fourth Count: (18 U. S. C. A., 80.)

And the said Grand Jurors on their oaths aforesaid, do further present:

I. That Ben A. Bost, on or about the 20th day of January, 1935, at San Francisco, California, in said Division and District, knowingly and wilfully falsified, concealed and covered up by a trick, scheme and device, a material matter within the jurisdiction of a department and agency of the United States, all as hereinafter set forth.

II. The Grand Jurors do hereby adopt the allegations of paragraph II of the First Count of this Indictment, and do hereby make the same a part hereof as fully as if the same were set out herein.

III. That on or about the 20th day of January, 1935, said defendant requested of the Mint of the United States, located at San Francisco, California, which was then and there an agency of the Treasury Department of the United States, that it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose

of inducing said Mint to purchase said gold, and in purported compliance with said regulations above mentioned, said deposit of gold was accompanied by an affidavit executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit "D", and made a part hereof; that in and by the terms of said affidavit, said defendant wilfully, knowingly and unlawfully, and contrary to his oath in said affidavit taken, declared, certified, and swore to certain material matters which were not true and which he did not believe to be true when he swore to said affidavit, to-wit: that he was the owner of a mining claim called "The Lucky Gravel Claim," and that the [6] source of said gold so tendered and deposited was "gravel, some nuggets", and that said gold had been recovered from said "Lucky Gravel Claim" in Cougar Canyon, El Dorado County, California, whereas in truth and in fact, as said defendant then and there well knew, he was not the owner of any mining claim in said County and State, known as or called "The Lucky Gravel Claim", and whereas in truth and in fact the source of said gold was not said "Lucky Gravel Claim" and said gold had not been recovered from said alleged claim.

Fifth Count: (18 U. S. C. A., 80.)

And the said Grand Jurors on their oaths aforesaid, do further present:

I. That Ben A. Bost, on or about the 27th day of July, 1934, at San Francisco, California, in said

Division and District, knowingly and wilfully falsified, concealed and covered up by a trick, scheme and device, a material matter within the jurisdiction of a department and agency of the United States, all as hereinafter set forth.

II. The Grand Jurors do hereby adopt the allegations of paragraph II of the First Count of this Indictment and do hereby make the same a part hereof as fully as if the same were set out herein.

III. That on or about the 27th day of July, 1934, said defendant requested of the Mint of the United States, located at San Francisco, California, which was then and there an agency of the Treasury Department of the United States, that it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose of inducing said Mint to purchase said gold, and in purported compliance with said regulations above mentioned, said deposit of gold [7] was accompanied by a purported affidavit which purported to have been executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit "E" and made a part hereof, that in and by the terms of said purported affidavit, said defendant wilfully, knowingly and unlawfully declared and certified and purported to swear to certain material matters which were not true, to-wit: that he was the owner of a mining claim called "The Lucky Gravel Claim" in Cougar Canyon, El Dorado County, California, and that the source of said gold so tendered and deposited was "gravel", and that said gold had

been recovered from said claim, whereas in truth and in fact, as said defendant then and there well knew, he was not the owner of any mining claim in said County and State, known as or called "The Lucky Gravel Claim", and whereas in truth and in fact, the source of said gold was not said "Lucky Gravel Claim," and said gold has not been recovered from said alleged claim.

H. H. McPIKE,
United States Attorney.

Approved as to form:
RMcW. [8]

EXHIBIT "A"
7779

TG-19
Treasury Department
Office of the Secretary.

AFFIDAVIT ACCOMPANYING DEPOSITS BY PERSONS WHO HAVE RECOVERED GOLD BY MINING OR PANNING.

State of California
County of Nevada—ss.

I, Ben A. Bost (name) of Nevada City, California (address) being first duly sworn on oath depose and say that I am the Owner of Lucky Gravel Claim (title of officer executing affidavit) of Ben A Bost, Nevada City, Calif. (name and address of depositor) the depositor of the gold described below; that I have personal knowledge of all the

facts concerning said gold as set forth in this affidavit;

A. Name and address of depositor is Ben A. Bost, Nevada City, California.

B. Description of shipment of gold delivered is one bar gold bullion.

C. Net weight of this shipment in troy ounces is 102.55.

D. Assay or estimated fineness in parts per 1000 is 850.

E. Content of fine gold in troy ounces is 87.70 (estimate if necessary).

F. The U. S. Mint or Assay office to which shipped is Mint at San Francisco.

G. The date shipped is April 5, 1934.

H. The source of the gold is Lucky Gravel Claim mostly small nuggets (State whether ore, tailing, or placer, etc.).

I. The tons of ore or tailings, or cubic yards of gravel from which this shipment was recovered are about 200 cubic yards.

J. The period within which the gold was taken from the mine or placer deposit is October 1, 1933 to March 31, 1934.

K. The name and location of mine or placer deposit from which the gold was recovered is Lucky Gravel Claim, Cougher Canyon, Eldorado Co., Calif.

L. The date such gold was first melted into crude metallic gold suitable for refining at a gold refinery is April 5, 1934.

M. The date such gold was converted into the form in which presented is April 5, 1934.

The gold referred to herein was recovered by this depositor by mining or panning and no part thereof has been held by this depositor or to the best of my knowledge, information and belief, by any other person at any time in noncompliance with the Act of March 9, 1933, any executive order or orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such order or license issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any regulations or license issued thereunder. No part of such gold has ever entered into monetary or industrial use.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or assay Office of gold described herein under and in accordance with the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder.

BEN A. BOST

By.....

Subscribed and sworn to before me this 5th day of April 1934.

[Seal] W. L. MOBLEY

(Officer administering oath.)

My commission expires Nov. 7th, 1934.

(To be executed in duplicate.) [9]

EXHIBIT "B"
11630

TG-19
Treasury Department
Office of the Secretary.

AFFIDAVIT ACCOMPANYING DEPOSITS BY PERSONS WHO HAVE RECOVERED GOLD BY MINING OR PANNING.

State of California
County of Nevada—ss.

I, Ben A. Bost (name) of Nevada City, California (address) being first duly sworn on oath depose and say that I am the owner of Lucky Gravel Claim (title of officer executing affidavit) of Ben A. Bost, Nevada City, Calif. (name and address of depositor) the depositor of the gold described below; that I have personal knowledge of all the facts concerning said gold or set forth in this affidavit;

A. Name and address of depositor is Ben A. Bost, Nevada City, California.

B. Description of shipment of gold delivered is one bar gold bullion.

C. Net weight of this shipment in troy ounces is 79.50.

D. Assay or estimated fineness in parts per 1000 is 850.

E. Content of fine gold in troy ounces is 67.30 (estimate if necessary).

F. The U. S. Mint or Assay office to which shipped is Mint at San Francisco.

G. The date shipped is May 16, 1934.

H. The source of the gold is gravel gold, small nuggets. (state whether ore, tailing, or placer, etc.)

I. The tons of ore or tailings, or cubic yards of gravel from which this shipment was recovered are about fifty tons.

J. The period within which the gold was taken from the mine or placer deposit is during the months of April and May, 1934.

K. The name and location of mine or placer deposit from which the gold was recovered is Lucky Gravel Claim, Cougher Canyon, Eldorado Co., Calif.

L. The date such gold was first melted into crude metallic gold suitable for refining at a gold refinery is May 15, 1934.

M. The date such gold was converted into the form in which presented is May 15, 1934.

The gold referred to herein was recovered by this depositor by mining or panning and no part thereof has been held by this depositor or to the best of my knowledge, information and belief, by any other person at any time in noncompliance with the Act of March 9, 1933, any executive order or orders of the Secretary of the Treasury issued thereunder, or in noncompliance with any regulations prescribed under such order or license issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any regulations or license issued thereunder. No part of such gold has ever entered into monetary or industrial use.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or assay Office of gold described herein under and in accordance with the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder.

By BEN A. BOST

Subscribed and sworn to before me this 16th day of May 1934.

[Seal] W. L. MOBLEY
(Officer administering oath)

My commission expires Nov. 7th, 1934.

(To be executed in duplicate). [10]

EXHIBIT "C"
22564

AFFIDAVIT ACCOMPANYING DEPOSITS BY PERSONS WHO HAVE RECOVERED GOLD BY MINING OR PANNING.

State of California
County of Nevada—ss.

I, Ben A. Bost (name) of Nevada City, Calif. (address) being first duly sworn on oath depose and say that I am the owner of Lucky Gravel Claim, Eldorado Co. (title of officer executing affidavit) of Ben A Bost, Nevada City, Calif. (name and address of depositor) the depositor of the gold described below; that I have personal knowledge of all the facts concerning said gold as set forth in this affidavit.

A. Name and address of depositor is Ben A. Bost, Nevada City, Calif.

B. Description of shipment of gold delivered is sponge gold bullion.

C. Net weight of this shipment in troy ounces is 124.25.

D. Assay or estimated fineness in parts per 1000 is 853.

E. Content of fine gold in troy ounces is 106.00 (estimate if necessary).

F. The U. S. Mint or Assay Office to which shipped, is San Francisco Mint.

Depositor is holder of Treasury License TGL ..... serial No..... (Fill out the order below if payment is to be made to other than depositor.)

Superintendent, U. S. Mint, San Francisco, Calif.

Sir: Make payment for the above deposit to.....

.....whose address is.....

These instructions are irrevocable. I hereby accept Mint scales weight. ..... (depositor).

(Be sure to complete other side of this form.)

G. The date shipped is April 17, 1935.

H. The source of gold is Lucky Gravel Claim, gravel gold (state whether ore, tailing, placer, etc.).

I. The tons of ore tailing, or cubic yards of gravel from which this shipment was recovered are about 160 tons, some nugets.

J. The period within which the gold was taken from the mine or placer deposit is during Jan., Feb., Mar., and April, 1935.

K. The name and location of mine or placer from which the gold was recovered is Lucky Gravel Claim, Coughar Canyon, Eldorado Co., Calif.

L. The date such gold was first melted into crude metallic gold suitable for refining at a gold refinery is ..... 193.....

M. The date such gold was converted into the form in which presented is April 16, 1935.

The gold referred to herein was recovered by this depositor by mining or panning and part thereof has been by this depositor or to the best of my knowledge, information and belief, by any person at any time in noncompliance with Act of March 9, 1933, any Executive Order or Orders of the Secretary of the Treasury issued thereunder or in noncompliance with any regulations prescribed under such order or license issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any regulations or license issued thereunder. No part of such gold has ever entered into monetary or industrial use.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of gold described hereinunder and in accordance with the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder.

Depositor must sign here

BEN A. BOST

By.....

Subscribed and sworn to before me this 17th day of April, 1935.

W. L. MOBLEY

My Commission expires Nov. 7th, 1935.

Execute this form in duplicate. Deposits of less than 5 gross ounces need not be sworn to, but those of over 5 gross ounces must be sworn to. [11]

EXHIBIT "D"

16476

AFFIDAVIT ACCOMPANYING DEPOSITS BY PERSONS WHO HAVE RECOVERED GOLD BY MINING OR PANNING.

State of California,
County of Nevada—ss.

I, Ben A. Bost (name) of Nevada City, California (address) being first duly sworn on oath depose and say that I am the owner of Lucky Grand claim (title of officer executing affidavit) of Ben A. Bost, Nevada City, Calif. (name and address of depositor) the depositor of the gold described below; that I have personal knowledge of all the facts concerning said gold as set forth in this affidavit.

A. Name and address of depositor is Ben A. Bost, Nevada City, Calif.

B. Description of shipment of gold delivered is gold bullion sponge.

C. Net weight of this shipment in troy ounces is 97.00.

D. Assay or estimated fineness in parts per 1000 is 848.

E. Content of fine gold in troy ounces is 82.50 (estimate if necessary).

F. The U. S. Mint or Assay Office to which shipped, is San Francisco Mint.

Depositor is holder of Treasury License TGL serial No. .....

(Fill out the order below if payment is to be made to other than depositor).

Superintendent, U. S. Mint, San Francisco, Calif.

Sir: Make payment for the above deposit to ..... whose address is ..... These instructions are irrevocable. I hereby accept Mint scales weight. ..... (depositor).

(Be Sure to Complete Other Side of This Form)

G. The date shipped is Jan. 19, 1935.

H. The source of gold is gravel, some nugets. (state whether ore, tailing, placer, etc.)

I. The tons of ore tailing, or cubic yards of gravel from which this shipment was recovered are about three hundred tons.

J. The period within which the gold was taken from the mine or placer deposit is during Sept., Oct., Nov. & Dec., 1934.

K. The name and location of mine or placer from which the gold was recovered is Lucky Gravel claim, Coughar Canyon, Eldorado Co., California.

L. The date such gold was first melted into crude metallic gold suitable for refining at a gold refinery is ....., 193.....

M. The date such gold was converted into the form in which presented is Jan. 18, 1935.

The gold referred to herein was recovered by this depositor by mining or panning and part thereof has been by this depositor or to the best of my knowledgs, information and belief, by any person at any time in noncompliance with Act of March 9, 1933, any Executive Order or Orders of the Secretary of the Treasury issued thereunder or in noncompliance with any regulations prescribed under such order or license issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any regulations or license issued thereunder. No part of such gold has over entered into monetary or industrial use.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of gold described hereinunder and in accordance with the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder.

Depositor Must Sign Here.

BEN A. BOST

By .....

Subscribed and sworn to before me this 19 day of Jan., 1935.

My Commission expires Nov. 7th, 1935.

WALTER L. MOBLEY

Execute this form in duplicate. Deposits of less than 5 gross ounces need not be sworn to, but those of over 5 gross ounces must be sworn to. [12]

EXHIBIT "E"

2917 Duplicate

Form TG-19, Treasury Department, Office of the Secretary

AFFIDAVIT ACCOMPANYING DEPOSITS BY PERSONS WHO HAVE RECOVERED GOLD BY MINING OR PANNING.

State of California,
County of Eldorado—ss.

I, Ben A. Bost (Name) of Nevada City, Calif. (address) being first duly sworn on oath depose and say that I am the owner of Lucky Gravel Claim (Title of officer executing affidavit) of Coughar Canyon, Eldorado Co., Calif. (Name and address of depositor) the depositor of the gold described below; that I have personal knowledge of all the facts concerning said gold as set forth in this affidavit.

A. Name and address of depositor is Ben A. Bost, Nevada City, California.

B. Description of shipment of gold delivered is Sponge Gold Bullion, some nuggets.

C. Net weight of this shipment in troy ounces is 120.50 oz.

D. Assay or estimated fineness in parts per 1000 is 856.

E. Content of fine gold in troy ounces is 103.20 (Estimate if necessary).

F. The U. S. Mint or Assay office to which shipped, is San Francisco Mint.

Depositor is holder of Treasury License TGL, serial No. .....

(Fill out the order below if payment is to be made to other than depositor)

Superintendent, U. S. Mint, San Francisco, Calif.

Sir: Make payment for the above deposit to ..... whose address is .....

Those instructions are irrevocable. I hereby accept Mint scales weight.

.....

(Depositor)

(Be Sure to Complete Other Side of This Form)

G. The date shipped is July 26, 1934.

H. The source of the gold is Gravel (State whether ore, tailing, placer, etc.)

I. The tons of ore or tailings, or cubic yards of gravel from which this shipment was recovered are about 100 Cubic Yards.

J. The period within which the gold was taken from the mine or placer deposit is during months of June and July, 1934.

K. The name and location of mine or placer deposit from which the gold was recovered is Lucky Gravel Claim, Eldorado Co., Calif.

L. The date such gold was first melted into crude metallic gold suitable for refining at a gold refinery is ....., 193.....

M. The date such gold was converted into the form in which presented is July 23, 1934.

The gold referred to herein was recovered by this depositor by mining or panning and no part thereof

has been held by this depositor or to the best of my knowledge, information and belief, by any other person at any time in noncompliance with the Act of March 9, 1933, any Executive Order or Orders of the Secretary of the Treasury issued thereunder or in noncompliance with any regulations prescribed under such order or license issued pursuant thereto, or in noncompliance with the Gold Reserve Act of 1934, or any regulations or license issued thereunder. No part of such gold has ever entered into monetary or industrial use.

I make this affidavit for the purpose of inducing the purchase by a United States Mint or Assay Office of gold described hereinunder and in accordance with the provisions of the Gold Reserve Act of 1934 and the regulations issued thereunder.

Depositor Must Sign Here.

BEN A. BOST

By .....

Subscribed and sworn to before me this 26 day of July, 1934.

W. L. MOBLEY

Notary Public

My Commission expires Nov. 7th, 1934.

Execute this form in duplicate. Deposits of less than 5 gross ounces need not be sworn to, but those of over 5 gross ounces must be sworn to. [13]

[Endorsed]: A true bill, Leon H. Enemark, Foreman. Presented in open court and ordered filed Mar. 30, 1937. [14]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 1st day of May, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable A. F. St. Sure, District Judge.

No. 25961.

UNITED STATES OF AMERICA,

vs.

BEN A BOST.

This case came on regularly this day for arraignment of defendant Ben A. Bost, who was present with Attorney, Ray Coughlan, Esq. V. C. Hammack, Assistant U. S. Attorney, was present for and on behalf of the United States. Defendant was duly arraigned, stated true name to be as contained in Indictment, waived formal reading thereof, and thereupon filed a Demurrer to the Indictment and Motion for Bill of Particulars. After hearing Attorneys, ordered hearing on said Demurrer and Motion and also the matter of entry of plea be and the same are hereby continued to May 8, 1937. [15]

[Title of District Court and Cause.]

DEMURRER

Comes now the defendant, Ben A. Bost, above named, and demurs to the Indictment on file herein, and alleges as follows:

I.

The facts set forth in the First Count do not state facts sufficient to constitute an offense against the United States.

II.

That it does not appear in said Indictment, in the First Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934.

III.

That it does not appear in said First Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

IV.

That it does not appear in said Indictment, in the First Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or officer thereof, or any corporation in which the United States of America is a stock holder.

V.

That it does not appear in said Indictment, in the First Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United [16] States of America is a stock holder.

VI.

That it does not appear in said Indictment, in the First Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the second count of said indictment, defendant specifies as follows:

I.

The facts set forth in the Second Count do not state facts sufficient to constitute an offense against the United States.

II.

That it does not appear in said Indictment, in the Second Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934.

III.

That it does not appear in said Second Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

IV.

That it does not appear in said Indictment, in the Second Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or officer thereof, or any corporation in which the United States of America is a stock holder.

V.

That it does not appear in said Indictment, in the Second Count thereof, that this defendant made or caused to [17] be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stock holder.

VI.

That it does not appear in said Indictment, in the Second Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Third Count of Said Indictment, Defendant Specifies as Follows:

I.

The facts set forth in the Third Count do not state facts sufficient to constitute an offense against the United States.

II.

That it does not appear in said Indictment, in the Third Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934.

III.

That it does not appear in said Third Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

IV.

That it does not appear in said Indictment, in the Third Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or Officer thereof, or any corporation in which [18] the United States of America is a stock holder.

V.

That it does not appear in said Indictment, in the Third Count thereof, that this defendant made

or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stock holder.

VI.

That it does not appear in said Indictment, in the Third Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Fourth Count of Said Indictment, Defendant Specifies as Follows:

I.

The facts set forth in the Fourth Count do not state facts sufficient to constitute an offense against the United States.

II.

That it does not appear in said Indictment, in the Fourth Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934.

III.

That it does not appear in said Fourth Count of the Indictment, nor can it be ascertained therefrom

how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof. [19]

IV.

That it does not appear in said Indictment, in the Fourth Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or Officer thereof, or any corporation in which the United States of America is a stock holder.

V.

That it does not appear in said Indictment, in the Fourth Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stock holder.

VI.

That it does not appear in said Indictment, in the Fourth Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Fifth Count of Said Indictment, Defendant Specifies as Follows:

I.

The facts set forth in the Fifth Count do not state facts sufficient to constitute an offense against the United States.

II.

That it does not appear in said Indictment, in the Fifth Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934. [20]

III.

That is does not appear in said Fifth Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

IV.

That it does not appear in said Indictment, in the Fifth Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or Officer thereof, or any corporation in which the United States of America is a stock holder.

V.

That it does not appear in said Indictment, in the Fifth Count thereof, that this defendant made

or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stock holder.

VI.

That it does not appear in said Indictment, in the Fifth Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Wherefore, this defendant prays that said Indictment be as to him dismissed.

Dated: April 30, 1937.

RAY T. COUGHLIN

Attorney for Defendant.

[Endorsed]: Filed May 1, 1937. [21]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 18th day of May, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

In this case the defendant Ben A. Bost was present with Attorney, R. Coughlin, Esq. Robt. L. McWilliams, Esq., Assistant U. S. Attorney, was present for and on behalf of United States. Ordered that the Demurrer to Indictment heretofore submitted herein be and the same is hereby overruled, and that the Motion for a Bill of Particulars, likewise heretofore submitted, be and the same is hereby denied, and that exceptions be entered as to said orders.

Defendant thereupon being called to plead, entered a plea of "Not Guilty", which said plea the Court ordered entered. After hearing Attorneys, ordered trial set for June 29, 1937. [22]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 23rd day of November, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

This cause came on regularly this day for trial of the defendant, Ben A. Bost, who was present with his Attorneys Ray T. Coughlin, Esq., and Robert Zarick, Esq., Robert L. McWilliams, Esq., and Sydney P. Murman, Esq., Assistant United States Attorneys, were present for and on behalf of the United States.

Thereupon the following persons, viz.:

1. Arthur W. Hooper
2. Roy R. Rogers
3. Geo. de St. Germain
4. Louis H. Heard
5. Allen V. Williams
6. Clarke E. Wayland
7. Edmund H. Mott
8. Charles H. Adams
9. Matthew G. Best
10. J. Henry Rosenbaum
11. Marcus A. Grenadier
12. Walter H. Baird

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues [23] joined herein. Mr. McWilliams made a statement to the Court and Jury on behalf of the United States. Mr. Coughlin made a statement to the Court and Jury on behalf of the defendant. Chas. W. Gray, H. L. Hastings, Andrew J. Loftus, H. C. Sedelmeyer, Harry D. McGlashan, Walter L. Mobley, R. C. Lynn, Laurence Bones,

Clarence Collins, Elmer C. Ogle, Robert Murdock, William Campbell, Edward N. Rains, E. L. Scott, Henry Lahiff, John A. Shields, J. C. Ackley, Sartor Francis, Charles B. Rich were sworn and testified on behalf of the United States. The United States introduced in evidence and filed 5 exhibits Nos. 1, 2, 3, 4, 5.

Thereupon the Court, after admonishing the Jury, ordered that the further trial of this case be and the same is hereby continued to Wednesday, November 24, 1937, at 10 a.m. [24]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 24th day of November, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

The parties hereto and the Jury heretofore impaneled herein being present, the trial hereof was thereupon resumed. Charles B. Rich and H. L. Hastings were recalled and further testified on behalf of the United States. Clyde M. Larigure,

John Bonard were sworn and testified on behalf of the United States. The case was then rested on behalf of the United States.

Mr. Coughlin moved the Court to instruct the Jury to return a Verdict of Not Guilty, which motion the Court ordered denied.

A. M. Holmes, Ben A. Bost, C. W. Chapman, C. S. Arbogast, J. Zannoco were sworn and testified on behalf of defendant.

Mr. McWilliams introduced in evidence and filed U. S. [25] exhibit No. 6.

Thereupon the defendant rested.

H. L. Hastings and R. C. Lynn were recalled and testified on behalf of the United States in rebuttal; and the evidence was closed. Mr. Coughlin renewed the motion to instruct the Jury to return a Verdict of Not Guilty in favor of the defendant. Ordered that the further trial hereof be continued until Friday, November 26, 1937, at 10 o'clock a.m., and the Jury after being duly admonished by the Court, was excused until that time. [26]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 26th day of November, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

The defendant, the Attorneys, and the Jury heretofore impaneled herein being present as heretofore, the further trial hereof was thereupon resumed. Ordered that the motion for directed verdict of not guilty be and the same is hereby denied. After argument by the Attorneys and the instructions of the Court to the Jury, the Jury at 1:54 p.m., retired to deliberate upon their verdict. At 2:54 p.m., the Jury returned into Court and upon being asked if they had agreed upon a verdict replied in the affirmative and returned the following verdict, which was ordered recorded, viz.: "We, the Jury, find as to the defendant at the Bar, as follows: Guilty, 1st Count; Guilty, 2nd Count; Guilty, 3rd Count; Guilty, 4th Count; Guilty, 5th Count. C. H. Adams, Foreman." The Jury, upon being asked if said verdict as recorded is their verdict, each juror replied that it is. Ordered that the Jury be discharged from the further consideration hereof [27] and that the jurors are hereby excused until notified to report.

It is ordered that the defendant be remanded into the custody of Ray T. Coughlin, Esq., his Attorney, and that defendant appear on December 3, 1937, at 10 a.m., for judgment.

Further ordered that this case be and the same is hereby referred to the Probation Officer for investigation and report. [28]

[Title of District Court and Cause.]

VERDICT.

We, the Jury, find as to the defendant at the bar, as follows:

Guilty, 1st Count.
Guilty, 2nd Count.
Guilty, 3rd Count.
Guilty, 4th Count.
Guilty, 5th Count.

C. H. ADAMS
Foreman.

[Endorsed]: Filed at 2:54 P.M. Nov. 26, 1937.

[29]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL.

Comes now the defendant, Ben A. Bost, and moves the above entitled Court for a new trial in the above entitled cause and for grounds specifies:

1. That on the trial the Judge admitted improper evidence.

2. That the verdict is contrary to the evidence.

3. That the verdict is contrary to law.

4. That the verdict should have been for the defendant.

5. That the Court erred upon the trial of said cause in deciding questions of law arising

during the course of trial, which errors were duly excepted to.

RAY T. COUGHLIN
ROBERT A. ZARICK
Attorneys for Defendant.

(Admission of Service)

[Endorsed]: Filed Nov. 30, 1937. [30]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 3rd day of December, in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

This cause came on regularly this day for hearing of the Defendant's Motion for New Trial and for the pronouncing of judgment upon the defendant Ben A. Bost. The defendant was present in Court with his Attorney, Ray T. Coughlin, Esq. Robert B. McWilliams, Esq., Assistant United States Attorney, was present for and on behalf of the United States. After hearing Mr. Coughlin, it is ordered that the Defendant's Motion for New Trial be and

the same is hereby denied, to which order the defendant was allowed an Exception.

Upon consideration of the Report of the Probation Officer, it is ordered that the defendant's application for probation be and the same is hereby denied.

The defendant was then called for judgment, duly informed by the Court of the nature of the Indictment filed against him on the 30th day of March, 1937, charging him with a [31] violation of Title 18 U.S.C.A., Section 80; of his arraignment and plea of Not Guilty; of his trial, and the verdict of the Jury on the 26th day of November, 1937. The defendant was then asked if he had any legal cause to show why judgment should not now be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for New Trial and a Motion in Arrest of Judgment; and

Whereas the said defendant having been duly convicted in this cause, as aforesaid,

It Is Therefore Ordered and Adjudged that the said Ben A. Bost be imprisoned in a United States Penitentiary to be designated by the Attorney General of the United States for and during the term and period of Five (5) Years and pay a fine in the sum of Five Thousand and No/100 ($5000.00) Dollars as to the First Count of the Indictment; be imprisoned for and during the term and period of Five (5) Years on the Second Count of the Indictment; be imprisoned for and during the term and

period of Five (5) Years on the Third Count of the Indictment; be imprisoned for and during the term of Five (5) Years on the Fourth Count of the Indictment; and be imprisoned for and during the term and period of Five (5) Years on the Fifth Count of the Indictment. Further ordered that in the default of the payment of said fine said defendant be further imprisoned in the United States Penitentiary until said fine be paid or until he be otherwise discharged in due course of law. Further ordered that said terms of imprisonment imposed on said defendant in this cause run concurrently.

Further Ordered that said defendant be committed, for said term of imprisonment, to the custody of the Attorney General of the United States or his authorized representative, and that the United States Marshal for this District forth- [32] with deliver said defendant to the Warden of said United States Penitentiary for and in execution of this Judgment.

Further ordered that a certified copy of this Judgment serve as the Commitment herein. [33]

In the Southern Division of the United States District Court for the Northern District of California.

No. 25961-S.

Violation: Title 18 USCA, Section 80 (False Affidavit—Gold Reserve Act).

UNITED STATES OF AMERICA

vs.

BEN A. BOST

JUDGMENT.

This cause came on regularly for trial on the 23rd day of November, 1937, Robt. L. McWilliams, Esq., Assistant United States Attorney, appearing on behalf of the United States, and the defendant being present in Court with Ray T. Coughlin, Esq., his Attorney.

Thereupon a Jury of twelve persons was duly impaneled, accepted and sworn to try the issues joined herein.

Whereupon, after hearing both oral and documentary evidence upon behalf of the respective parties, the cause was submitted to the Jury, who retired to deliberate upon their verdict, and subsequently returned into Court, and being called all answered to their names, and upon being asked if they had agreed upon a verdict, rendered the following written verdict, which was by the Court ordered recorded on the minutes of the Court and which said verdict is as follows:

"We, the Jury, find as to the defendant at the bar, as follows:

Guilty, 1st Count.
Guilty, 2nd Count.
Guilty, 3rd Count.
Guilty, 4th Count.
Guilty, 5th Count.

C. H. ADAMS,
Foreman."

Whereas, on the 3rd day of December, 1937, the defendant and the attorneys being present in Court, the defendant was called for Judgment. The defendant was duly informed by the Court of the nature of the Indictment filed against him on the 30th day of March, 1937, charging him with a violation of Title 18 USCA, Section 80; of his arraignment and plea of Not Guilty; of his trial and the verdict of the Jury on the 26th day of November, 1937.

The defendant was then asked if he had any legal cause to show why judgment should not now be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having Denied a Motion for New Trial and a Motion in Arrest of Judgment; and

Whereas, the said defendant having been duly convicted in this Court, as aforesaid, [34]

It Is Therefore Ordered and Adjudged that the said, Ben A. Bost, be imprisoned in a United States Penitentiary to be designated by the Attorney Gen-

eral of the United States for and during the term and period of Five (5) Years and pay a fine in the sum of Five Thousand and No/100 ($5000.00) Dollars as to the First Count of the Indictment; be imprisoned for and during the term and period of Five (5) Years on the Second Count of the Indictment; be imprisoned for and during the term and period of Five (5) Years on the Third Count of the Indictment; be imprisoned for and during the term and period of Five (5) Years on the Fourth Count of the Indictment; and be imprisoned for and during the term and period of Five (5) Years on the Fifth Count of the Indictment. Further ordered that in default of the payment of said fine said defendant be further imprisoned in the United States Penitentiary until said fine be paid or until he be otherwise discharged in due course of law. Further ordered that said terms of imprisonment imposed on said defendant in this cause run concurrently.

Further Ordered that said defendant be committed, for said term of imprisonment, to the custody of the Attorney General of the United States or his authorized representative, and that the United States Marshal for this District, forthwith deliver said defendant to the Warden of said United States Penitentiary for and in execution of this Judgment.

Further Ordered that a certified copy of this Judgment serve as the Commitment herein.

Dated: San Francisco, California. December 3, 1937.

A. F. ST. SURE
United States District Judge.

Examined by:
R. McW.
Assistant United States Attorney.

Judgment filed and entered this 3rd day of December, 1937.

WALTER B. MALING
Clerk,
By C. W. CALBREATH
Deputy Clerk.

Entered in Vol. 30 Judg. and Decrees at Page 455-456. [35]

No. 25961-S.

UNITED STATES OF AMERICA

vs.

BEN A. BOST.

Specific Violations.—Violation of 18 U.S.C.A. Sec. 80 (False Affidavit Gold Reserve Act).

First Count of the Indictment—Said defendant requested the Mint of the United States located at San Francisco, California, to purchase certain gold, which was accompanied by an affidavit, wherein said defendant wilfully, knowingly and unlawfully and contrary to his oath swore to certain material mat-

ters which were not true and which he did not believe to be true when he swore to said affidavit, to-wit, that he was the owner of a mining claim that the gold was removed from said claim.

Second, Third, Fourth and Fifth Counts—Same offense described in the First Count as to various dates and amounts of gold. [36]

At a Stated Term, to-wit: The October Term A. D. 193—, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the fourteenth day of February in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding,
Honorable Francis A. Garrecht, Circuit Judge,
Honorable Clifton Mathews, Circuit Judge.

25961-S.

No. 8678.

BEN BOST,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME FOR LODGEMENT OF BILL OF EXCEPTIONS AND SETTLEMENT THEREOF, AND ASSIGNMENT OF ERRORS.

The motion of Ben Bost, the appellant in the above entitled action, came on regularly for hearing on the 14th day of February, 1938, upon all the files, papers, proceedings and records in the above entitled action, James M. Hanley appearing as attorney for appellant, and Robert L. McWilliams, Assistant United States Attorney appearing for the appellee, and good cause appearing therefor,

It Is Ordered that the appellant be and he is hereby given an extension of time in which to lodge bill of exceptions and file his assignment of errors in the above entitled action, to and including the 21st day of February, 1938.

And It Is Further Ordered that the appellee is granted to and including the 3rd day of March, 1938, in which to file amendments to the bill of exceptions; and

It Is Further Ordered that the trial court may then settle said bill of exceptions within five days thereafter.

(Certification of Clerk, U. S. Circuit Court of Appeals).

Filed Feb. 14, 1938. [37]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS OF DEFENDANT BEN A. BOST.

Be It Remembered: That on or about the 30th day of March, 1937, the grand jury of the United States in and for the Northern District of California, Southern Division, returned in this Court its indictment against the defendant in the above-entitled cause, charging him in five counts of violating Section 80, Title 18, U.S.C.A.; that thereafter said defendant appeared in said court and was duly arraigned.

And Be It Further Remembered: That thereafter, and on the 1st day of May, 1937, and before said defendant Ben A. Bost had pleaded to said indictment, there was filed on behalf of said defendant a demurrer to said indictment, which said demurrer was, by the Court, subsequently overruled. Said ruling was duly excepted to.

(Exception No. 1.)

And Be It Further Remembered: That thereafter, the defendant having pleaded not guilty, and the cause being at issue, the same came on for trial on Tuesday, November 23, 1937, before the Honorable A. F. St. Sure, District Judge of said Court, the United States being represented in court by Robert L. McWilliams, Esq. and Sydney P. Murman, Esq., Assistant United States Attorneys, and the defendant being personally present and [38] represented by Ray T. Coughlin, Esq., the following proceedings were had:

Mr. McWilliams made a statement to the Court and Jury on behalf of the United States, and Ray T. Coughlin made a statement to the Court and Jury on behalf of the defendant.

Thereupon the Government, through Robert L. McWilliams, Assistant United States Attorney, called

CHARLES W. GRAY,

who testified under oath as follows:

I am in the employ of the United States Mint as license clerk. I have been so employed approximately four years. My duties with respect to affidavits that may be sent to the Mint along with gold which is offered to the Mint for purchase or, the affidavit comes through the mail and is brought to me; I review it and see whether it is filled out correctly and it is then O.K.'d by me and sent to the receiving room. I have seen these five purported affidavits. Two were taken from the Mint records and were brought here by me, and the other three are initialed by me as received and sent to the receiving room at the time the deposits are accepted. The dates indicate that they were received on or about the dates they bear, and there is a red pencil mark here showing the date the deposits were received in the receiving room. These affidavits, after they arrive, are checked as to whether or not they are filled out correctly, and then taken into the receiving room and turned over to the receiving clerk. Mr. Hastings is the receiving clerk.

The next witness called for the Government was

H. L. HASTINGS,

who testified under oath as follows:

I am employed in the United States Mint. I am head of the [39] receiving room. I have been employed there about 40 years.

Q. Referring to these affidavits, do you have anything to do with either of these or similar affidavits, or with the gold that is submitted with them?

A. They have to be re-sealed with the deposits they refer to.

Q. Will you explain what you mean by saying "re-sealed"?

A. They open the packages and then note the name on the package and compare it with the name and date on the affidavit showing that the two go together. That was done in this case with these affidavits.

The next witness called for the Government was

ANDREW J. LOFTUS,

who testified under oath as follows:

I am a computer in the United States Mint. I have held that position about four or five years. A computer is one who computes all of the deposits that are made in the Mint. For example, when gold is submitted or deposited at the Mint for sale, the first thing that happens to that gold after it is turned in is it goes into the receiving room and then afterwards comes back to me to be computed.

(Testimony of Andrew J. Loftus.)

I have nothing to do with the affidavits. With reference to the gold, itself, I compute its weight and value.

The next witness called for the Government was

H. C. SEDELMEYER,

who testified under oath as follows:

I am a civil engineer. I am in the United States Forest Service. I have been connected with the United States Forest Service twenty-five years, in San Francisco. I receive from time to time maps from the Department at Washington. I have a map [40] from my own private reports in San Francisco. It is a map of the Eldorado National Park. It is an official map.

Mr. McWilliams: I desire to offer the map in evidence and ask to have it marked as Government's Exhibit.

Mr. Coughlin: Might I inquire the purpose?

Mr. McWilliams: Yes, it is for the purpose of showing that neither on this map nor any other official map is there any Cougar Canon, although there are many canons and many other places and towns and topographical points indicated on the map, but no Cougar Canon.

Mr. Coughlin: That is objected to on the ground that no proper foundation has been laid for the map.

The Court: You will have to proceed further and lay a foundation.

(Testimony of H. C. Sedelmeyer.)

Mr. McWilliams: Q. Will you state what you mean when you say that this is an official map in your department?

A. This is a map that we use for all of our demonstration work in the National Forest, and was prepared in San Francisco from U. S. Surveys, General Land Office Surveys, and our own surveys, it was compiled from all different sources into one map.

The Court: Who compiled it?

A. It was done under my supervision by one of the draftsmen.

Q. It is correct?

A. It is as far as the information we had.

Q. Where did you get your information?

A. From the United States Geological Survey, the General Land Office Survey, and our own surveys, timber surveys.

The Court: Is that all?

Mr. McWilliams: Yes.

Mr. Coughlin: May I further urge the objection that it is hearsay?

The Court: Overruled. [41]

Mr. McWilliams: May it be marked as United States Exhibit 1?

The Court: Yes.

Mr. Coughlin: We note an exception.

(Exception No. 2.)

(The map was marked "U. S. Exhibit 2.")

(Testimony of H. C. Sedelmeyer.)

Cross-Examination.

By Mr. Coughlin:

I did not draw this map, myself. I compared this map with the country surrounding Georgetown and Eldorado County. I did not go up there myself and do it. I went and checked with each ranger as to the correctness of the map, itself. I did not do it, myself. I am reasonably sure that every canon that is referred to or mentioned by the natives or miners in or around Georgetown is designated on that map, but I am not positive. The mining claims in Eldorado County do not appear on that map. We never make a practice of consulting various old miners in the vicinity of Georgetown and Eldorado County because we can't rely on that information. The area of Eldorado County is 1737 miles. I do not know how many mining claims there are recorded in Eldorado County; I have not any idea how many there were in 1931; I have not anything to do with mining claims. This map was drawn originally in 1923 or 1924 and revised to 1934-5.

The next witness for the Government was

HARRY D. McGLASHAM,

who testified under oath as follows:

Direct Examination.

By Mr McWilliams:

I am assistant engineer of the United States, geological engineer. I have been with the United

(Testimony of Harry D. McGlasham.)

States Geological Survey [42] 31 years. The Geological Survey has many different duties; the work is divided into various branches; there is the geological branch, there is the topographical branch, which makes maps. When the Geological Survey was organized the geologists found they could not go ahead without maps, so the map division was organized, and as a result they prepared a map primarily for the use of geologists, and incidentally for public use. I think that there are maps in existence prepared by our department covering Eldorado County; I think the whole county is covered. I have several maps that cover Eldorado County. I have official maps of my department covering Georgetown in Eldorado County and covering Rattlesnake Bridge. I have received those maps from our Washington office. They are official maps used in my department; I took them from my files. I had nothing to do with making them up, myself. I know they are official maps put out by the department.

Mr. McWilliams: I desire to offer these in evidence as one exhibit.

Mr. Coughlin: To which we object, if your Honor please, on the ground that the proper foundation has not been laid, that they are hearsay.

The Court: Overruled.

Mr. Coughlin: Exception.

(Exception No. 3.)

(The maps were marked "U. S. Exhibit 3.")

(Testimony of Harry D. McGlasham.)

Cross-Examination.

By Mr. Coughlin:

I did not draw these maps. They were not drawn under my supervision. [43]

Redirect Examination.

By Mr. McWilliams:

The brown lines are the contour lines which connect points of equal elevation and the black lines relate to land divisions, county lines, etc.

The next witness for the Government was

WALTER L. MOBLEY,

who under oath testified as follows:

Direct Examination.

By Mr. Murman:

I am a justice of the peace of Nevada Township, Nevada County, California. I am also a notary public for that same county. I have been a notary eight years. On Government's Exhibit 1 for identification, consisting of what purport to be five affidavits, which affidavits bear on the reverse side thereof what purports to be the signature of Walter L. Mobley, those signatures are in fact my signature. They were placed on those affidavits by me on the dates set forth therein as the dates upon which the affidavits were subscribed and sworn to before me. On each of these affidavits there appears to be the

(Testimony of Walter L. Mobley.)

signature of Ben A. Bost, and that was placed on those affidavits in my presence by Ben A. Bost. I see Ben A. Bost in the court-room. The record shows that the witness identified the defendant Bost. At the time that the defendant in this case placed his signature on those affidavits, prior to his placing his signature on those affidavits I swore him to tell the truth. I did that on each occasion, as far as I remember. I have no doubt in my mind about it because I never stated otherwise. That is my usual practice. I can state Mr. Bost placed his signature on those affidavits on the dates set forth therein as the dates on which [44] they were subscribed and sworn to by him.

Mr. Murman: If your Honor please, at this time I ask that the affidavits heretofore marked as Government's Exhibit 1 for identification be placed in evidence as Government's Exhibit 1.

The Court: Admitted.

(The five affidavits were marked "U. S. Exhibit 1.")

The next witness for the Government was

R. C. LYNN,

who testified under oath as follows:

Direct Examination.

By Mr. McWilliams:

I am a special agent, Bureau of Internal Revenue. I have been employed in that department of

(Testimony of R. C. Lynn.)

the Government three years. I know the defendant Ben A. Bost. I first met him on August 8, 1936, at his home near Nevada City, California. The occasion I had to meet him at that time and place was I had been instructed by my superior officer to make an investigation of several individuals who it was thought possibly were handling and dealing in stolen high grade gold ore, and I searched the records of the United States Mint for the names of licensed gold buyers, or former licensed gold buyers who were selling gold in Nevada County, and Mr. Bost's name was one of those that I found. I thereupon called upon him at the time and place mentioned, and had a conversation with him. The first conversation was on the morning of August 8, 1936. There was no one else present besides Mr. Bost and myself. I have a memorandum which was not prepared at that time. It correctly sets out the notes I made of the interview. They were made when I discussed the case with Mr. McWilliams. I also have the original memorandum made at [45] the time that I have used to refresh my memory.

Mr. McWilliams: I doubt the propriety of your using these under the circumstances, but will you from your recollection and from your former examination of your original notes state what occurred in the conversation that took place?

A. He said that the gold sold by him to the Mint during 1935 was produced from the Lucky Gravel mining claim, and that he owned the mineral

(Testimony of R. C. Lynn.)
rights in this claim, and that he had leased it to seven men who were actually producing the gold. I asked him where the mine was located, and he said it was approximately 40 miles north of Georgetown, and possibly in Eldorado County.

Q. What did he state, if anything, as to whether he knew these men?

Mr. Coughlin: To which we object on the ground that—

Mr. McWilliams: I will withdraw the question. Proceed with the conversation.

Mr. Coughlin: I am going to object to this line of testimony on the ground that the corpus delicti has not been proven.

The Court: Overruled.

Mr. Coughlin: May I have an exception?

The Court: Yes.

(Exception No. 4.)

That was substantially all the discussion we had on that occasion regarding the Lucky Gravel mining claim. That was substantially all the discussion we had on that day. The next conversation I had with him was on the morning of August 24, 1936 at his home. No one else was present.

Q. State the conversation that occurred on that occasion?

Mr. Coughlin: The same objection.

The Court: Overruled.

Mr. Coughlin: Note an exception.

(Exception No. 5.) [46]

(Testimony of R. C. Lynn.)

I told Mr. Bost that I had made a number of inquiries in an effort to determine where the Lucky Gravel mining claim might be located, and that I had been unsuccessful in finding the mine, and told him that I would furnish transportation if he would go with me to show me the mine. He said that he could not do that for the reason that he had never seen the mine but once, on one occasion, and that one of the men leasing it had met him with jacks below Auburn, at Rattlesnake Bridge, and they had ridden approximately 40 miles in a northeasterly direction, and as it had been five or six years before that he did not recall the route that he took, exactly, and would not be able to show me the mine.

I have been to Rattlesnake Bridge. It is on the highway below Auburn going to Placerville. It is just a little ways east of that highway and a number of miles south of Auburn. I would not be able to tell you definitely how many miles south of Auburn. Refreshing my recollection from Government's Exhibit 2, it is about 6 or 7 miles south. I know where Georgetown is. It is approximately due east of Auburn and on the map it is fourteen miles. He stated on that occasion he could not take me there as he did not know the way. I had another conversation with him at his office in Nevada City on September 18, 1936. Deputy Collector of Internal Revenue William Malloy was present. I told Mr. Bost that I had not been successful in locating the mine, or any record of it, nor had I found anyone

(Testimony of R. C. Lynn.)

who had ever heard of it besides himself, and told him that I wanted to question him further regarding it, and he said he would answer any questions I asked him, so I placed him under oath. I am authorized to do that in my capacity as a representative of the Internal Revenue Department. I placed him under oath and after warning him of his constitutional rights, that he would not be required to answer any questions which would incriminate him, I asked him questions about the circumstances under which he acquired this mine [47] and leased it. In answer to my questions he said that he had known G. A. Swissler years ago in Trinity County. He did not spell Swissler's name, but he produced a copy of a purported lease on which Swissler's name was.

Mr. Coughlin: In order that I do not interrupt may it be understood that my objection goes to this entire line of testimony?

The Court: Yes.

Mr. Coughlin: On the ground that corpus delicti has not been proven.

The Court: Yes. Of course, if it is not connected up you can move to strike it out.

Mr. McWilliams: Yes, that is stipulated to.

(Exception No. 6.)

He said that about five or six years ago, prior to that date in 1936, Mr. Swissler had come to him and told him he had located a claim which might be worth working for ore production, and Swissler said that he needed money to start working it,

(Testimony of R. C. Lynn.)

whereupon Mr. Bost furnished him several hundred dollars. Later Mr. Bost told me in that same conversation that he had probably invested as much as $500 in the mine; that after advancing Swissler this money he next heard about the claim when one Hans Hensen—Mr. Hensen's name appears in that lease.

Mr. McWilliams: Might I interrupt you and show you what purports to be such a lease and ask you if that is the document that he gave you at that time.

A. Yes.

Mr. McWilliams: I desire to read it in evidence, if your Honor please, at this time, as well as offer it.

(The lease was marked "U. S. Exhibit 4.")

Proceeding with Mr. Bost's statement, he said that subsequent to the time he advanced that money to Swissler Mr. Hensen came to [48] him and requested that he go to see the claim; that he then met Hensen at Rattlesnake Bridge, below Auburn, and he said it was in the fall, frost was on the ground, and Hensen had some jacks with him there at the bridge, and they started after dark, in the evening, and rode at least seven hours, he said possibly longer, in a northeasterly direction, and arrived at the claim before daylight, where they met Mr. Swissler; that he stayed at the claim one day, made the return trip to Rattlesnake Bridge after dark the next evening; that he next saw Swissler and Hensen on or about January 2, 1932,

(Testimony of R. C. Lynn.)

when they came to his home in Nevada City and had with them a third individual whose name appears on the lease as Larry Larsen. He said those three men brought him retorted gold which weighed, as I recall, 41.76 ounces. I have seen retorted gold and know what it is. It is gold that is mined or panned, covered with mercury, and in a sponge, in a porous form; that is retorted gold. Mercury, so to speak, absorbs the gold. Sponge is a sort of porous type of gold. He said that when the three brought the gold to him it was the first time he knew that they had obtained any production; that he then melted the gold and examined it, himself, and the three men said they considered him the real owner of the mineral rights on the claim, and said they would like to lease it from him, and that either that first day that they came to him, or the day following, January 2, 1932, the lease was drawn, which he exhibited to me; that he thereupon sent that gold to the United States Mint, and, according to the terms of the lease—at that time the men were at the office—he advanced them 90 per cent. of what he estimated was the value of the gold, as under the terms of the agreement with them he was to retain ten per cent. of the production for himself. I did not go into the price that was used as the basis of compensation per ounce. That was the old [49] price, between $21 and $35. That after the time the lease was drawn he had never seen Larsen again; that he saw Swissler again on one occasion,

(Testimony of R. C. Lynn.)

which was approximately three years prior to September, 1936, when Mr. Swissler came to his home; that all of his subsequent shipments of gold to the United States Mint after that lease was drawn represented gold which Larsen had brought to him and said it was produced at the Lucky Gravel Mining Claim; that each time when Larsen would bring a lot of gold to him Bost would borrow sufficient money from some relative to advance Larsen the estimated 90 per cent. of the value. It was Larsen that brought it. I made a memorandum of the first conversation at the time, I made a memorandum of the second conversation in my diary immediately after I left his home, and made a memorandum of his answers to my question when he was under oath at the time he answered them. As I recall, that was approximately all the information that I secured from him regarding the Lucky Gravel mining claim; he reiterated his previous statement made, that he could not take me to the mine as he did not recall just exactly where it was; he said he remembered that it was north of Georgetown approximately 40 miles in a northeasterly direction from Rattlesnake Bridge. He said that Hansen had been bringing these lots of gold in to him during 1932, 1933, 1934 and 1935. He said that he had not seen Hensen since the time Hensen brought the gold to him in the fall of 1935, which was the last shipment that Bost had made to the Mint, and that he had not seen Hensen for approximately a year; that he did not know

(Testimony of R. C. Lynn.)

why they suddenly quit bringing gold to him, and that he had never questioned their honesty in bringing the gold produced to him so that he would have his 10 per cent. I asked Mr. Bost if he could tell me where I might locate them, and he said he had never written to them, nor had they ever written to him, and that he had no idea where I [50] could locate them. I do not recall that he said anything in regard to the record being kept by the parties to this lease of the amount of production and other data. He did not show me any record that I recall. I asked Mr. Bost why the mineral rights to the property had never been claimed through a recording with the County Recorder of either Eldorado or Placer County, wherever the mine was located, and he said he had no idea why no claim had ever been filed in the official records. He also said he had never discussed with any of the three men the propriety of filing, and he also said that he understood there were seven men, including the three signators, working the claim, but that he did not know the names of the other four, nor had he ever seen them. He said his total investment in the mine was probably as much as $500. I questioned him as to any anxiety on his part of the men bringing in all the gold produced, and he said he never questioned their honesty about bringing in all the gold the mine produced. He said the last time he had seen Hensen was approximately a year prior to the date I was questioning him; he stated it as being just prior to the date he made his last

(Testimony of R. C. Lynn.)

shipment to the Mint. As I recall, he said he always paid Hensen 90 per cent. of the estimated value of the gold. I do not believe I questioned him about what Hensen did with the money. I have stated all the interviewers that I now recall. I just questioned Mr. Bost on three occasions. I subsequently during that period made an investigation to try to locate whether there was such a mine in such a canon.

Q. When and where and with whom did you make such an investigation?

A. Well, on August 18, 1936, I went to the office of Mr. DeWitt Nelson, superintendent of the Tahoe National Forest in Nevada City and searched the maps and records in his office, and questioned Mr. Nelson, and questioned certain of his rangers regarding Cougar Canon, or Lucky Gravel mining [51] claim, and found no information.

Mr. Coughlin: We object to this and ask that the answer be stricken on the ground it is hearsay.

Mr. McWilliams: I submit it is not hearsay. It is direct information to the point that there was no such place given.

The Court: Denied.

Mr. Coughlin: May I have an exception, your Honor?

(Exception No. 7.)

On August 27 I went to the office of the superintendent of the Eldorado National Forest in Placerville, California, and there questioned Acting Forest Supervisor Harris, and searched the maps and rec-

(Testimony of R. C. Lynn.)

ords in his office without obtaining any information regarding Cougar Canon or Lucky Gravel mining claim, and on that same day I went to the office of the County Assessor of Eldorado County, Mr. C. L. Scott, and he told me he had formerly been a forest ranger at the Georgetown Ranger Station, and in his work covered all of the known trails and roads in the northern part of the county, and Mr. Scott was unable to furnish me with any information about this mine. I questioned Sheriff Smith, I believe his name is, and he was also unable to furnish me with any information. I made inquiry at the post office of Coloma and Pilot Hill. They are on the highway between Placerville and Auburn; they are west and slightly south of Georgetown. I found that neither one of the three purported lessees ever received mail at that place, at least during the time of the postmaster on duty. On September 5, 1936, I searched the records of the County Recorder for Placer County, at Auburn, California, and found no record that any claim had ever been filed. On August 27, 1936, I questioned the County Surveyor of Placer County and was unable to secure any information whereby I could locate the mine. On September 11 and 12, 1936, in company with [52] Secret Service Agent Charles Rich, we made a thorough search of the territory along the middle fork of the American River north of Georgetown and east of Forest Hill and Michigan Bluff, California.

Q. Did you make inquiries during the course of that trip?

(Testimony of R. C. Lynn.)

A. Yes, we interviewed the road supervisor, McFadden, I believe his name was, at Forest Hill, who stated he was very familiar with all of that territory—

Mr. Coughlin: I submit that this is hearsay testimony and I ask that the answer be stricken out.

Mr. McWilliams: I submit it comes in under that exception which permits the result of searches to be admitted. We have authorities, if your Honor desires them.

Mr. Coughlin: He is testifying now to what someone else told him.

Mr. McWilliams: I have that in mind.

Mr. Coughlin: That is not admissible.

Mr. McWilliams: I anticipated that objection and looked up the law, and we have the authorities if necessary.

Mr. Coughlin: May I have an exception?

The Court: Yes, the objection is overruled.

(Exception No. 8.)

I questioned the Forest Ranger on duty at the Robertson Flat Ranger Station, which is a few miles north of the Middle Fork of the American River; we questioned the forest ranger at French Meadows, Mr. Olinger; also in the same vicinity where the alleged mine was said to be. I questioned a miner working a claim out at the Goggins Mine in that vicinity, walked approximately four miles down to the end of the American River Canon, and questioned three miners whom we found working

(Testimony of R. C. Lynn.)

in there on a small claim; we also searched the Duncan Canon territory on the north [53] side of the American River, and made inquiry in Michigan Bluff and Forest Hill of numerous individuals.

Q. What was the result of those inquiries?

A. The result was we found no one who knew anyone by the name of those individuals whose names appear on the purported lease. We found no one who had heard of such a mining claim. We learned that there had been a Hans Hanson located at Michigan Bluff for several years. We located this Hanson at Isleton Ferry, below Sacramento. This man Hanson said that he had hunted and trapped all through the territory north of Georgetown a good many years, that he prospected a claim—

Mr. Coughlin: I submit, respectfully, that this is hearsay.

Mr. McWilliams: Q. Did he know of any such persons?

A. He did not. That is all I recall of pertinent information at this time.

(Thereupon a recess was taken until two o'clock p.m.)

H. L. HASTINGS,

was recalled as a witness for the Government.

Direct Examination.

(By Mr. McWilliams)

Attached to the affidavits which have been offered in evidence this morning are certain Railway Express tags. These tags came off the packages that the Express Company delivered to us. They are then fastened onto the affidavits. I keep tags with the weight and description. The description is according to the name on the affidavit. I make the weight, myself on the scales of the gold. The dates impressed with a rubber stamp are the dates that we receive the deposit and weigh it.

Mr. McWilliams: I offer these documents in evidence, your Honor. [54]

The Court: Very well.

(The documents were marked "U. S. Exhibit 5.")

I have brought with me the official records of my department showing the fineness of that gold and the number of ounces in the five shipments. These entries are official entries of my department. All of those entries were made either by me or under my direction. The particular entries dealing with the five shipments that are described on the tags and the affidavits are scattered through three different books. I will give you the first one. The receipt number is 7779, which is on the top right-hand corner of the affidavit. The name of the depositor is Ben A. Bost; the description is a bar, Location Eldorado

(Testimony of H. L. Hastings.)

County, California, Deposit number A-915; the weight before melting was 102.55 ounces, weight after melting 102.51. The fineness of the gold was .848½, fineness in silver .143; the pure gold content was 86.976, and the silver content was 14.71. There is a margin note here "89.15 Nevada City, Lucky Gravel Claim, Cougar Canon." The fineness is taken from the assayer's report. The weight comes from me, the name and address from the affidavit, and marginal note from the affidavit. Fineness means the percentage of purity. Turning to the item 11,630, depositor John A. Bost, Description, 1 Bar Gold, Eldorado County, California. Deposit number 13,243; Weight before melting 79.50, Weight after melting 79.43. Fineness in gold .847½. Fineness in silver .144½. Fine ounces in gold 67.316. Fine ounces in silver 11.47. And the same marginal note as the other one, "Lucky Gravel Claim." Address Nevada City. The next one is 2917, Depositor John A. Bost, Description: Amalgam cake. Deposit Number 3195. Weight before melting 120.45. Weight after melting 119.51. Fineness in gold .837¼. Fineness in silver .153½. Fine ounces in gold 100.059. Fine ounces in silver, that is, pure silver, 18.34. Nevada City, Lucky Gravel Mine. [55] Amalgam cake is what miners usually call sponge; that is gold with quicksilver which is retorted to remove the quicksilver.

The next number is 16,470. Name of the Depositor Ben A. Bost. Description, Amalgam Cake. Eldorado

(Testimony of H. L. Hastings.)

County, California. Deposit No. 21,900. Weight before melting 97.12. Weight after melting 96.64. Gold fineness .870. Silver fineness .122. Gold content 84.073. Silver content 11.79. Nevada City Lucky Gravel Claim.

Next is No. 22,564. Depositor Ben A. Bost. Description Amalgam Cake, Eldorado County. Deposit No. 29,040. Weight before melting 124.25. Weight after melting 121.94. Fineness in gold .853. Fineness in silver .130. Fine gold content 104.014. Fine silver content 16.58. Nevada City, Lucky Gravel Mine.

Thereupon

R. C. LYNN

was recalled for the Government.

Direct Examination
(Resumed)

(By Mr. McWilliams)

During the noon hour I have thought over the items of the conversation I had with Mr. Bost and found that I overlooked some. On my interview with Mr. Bost on August 8, 1936, he mentioned that the purported claim was on the public domain; in answer to a question of mine he also stated that Mr. Hensen had never told him where mail would reach him. At my interview with Mr. Bost on September 18, 1936, I asked him why he claimed the gold came from a mining claim in Eldorado County if he

(Testimony of R. C. Lynn.)

was not able to fix the place of Cougar Canon, or the purported claim better than he had, and he said the Lucky Gravel Mining Company was in Eldorado County in his affidavits to the Mint, because the three lessees told him that was the county the claim was in. I asked him how [56] he arrived at the figures which he placed on the affidavits to the Mint for total yardage or tons of earth and rock removed for the production of the particular gold in a certain shipment to the Mint, covered by an affidavit, and he said he always took the figures for that as given him by Mr. Hensen at the time Hensen would bring the gold to him. He told me that prior to the time the proposed lease was drawn on January 2, 1932 he only had an oral agreement with Mr. Swissler. When the request was subsequently made for the execution of this lease by him to this group, that they considered him the owner, he did not make any explanation of that statement as to why they considered him the owner. I asked him if he knew where Hensen might be addressed, and he said he never learned any mail address. I made notes at these different meetings.

Cross Examination

(By Mr. Coughlin)

Mr. Bost discussed with me the trip to the claim that he had taken in detail on September 18, 1936. There were present Mr. Bost, myself, and Deputy Collector of Internal Revenue Mr. Malloy. At that

(Testimony of R. C. Lynn.)

time I made a pencil memorandum. As I recall, he said that Hensen had the jacks at Rattlesnake Bridge to go into the canon on. I did not ask him the number. He said it took seven hours or more, possibly longer, for him and Hensen to arrive at the claim after they got on the mules. He said he remained at the claim that succeeding day and departed at night fall the next day. He said they returned by jacks. I did not question him about the return. I do not believe he told me who came out with him. I did not have any discussion with him relative to the weather conditions except to the extent I asked him what time of the year it was, and he said it was in the fall, when there was frost on the ground. He did not state [57] what month. When he arrived upon the claim he said he had spent the day there and Hensen showed him about the ground. As I recall, he said the workings were next to a small stream in the canon from which the men procured the drinking water, and that he was in a tunnel. I believe he said the tunnel was approximately 1000 feet long. I do not believe that he mentioned whether or not there were conveyances in the form of a track or car in the tunnel. He said he saw only the men Swissler and Hensen. I do not believe he mentioned a man by the name of Peterson. There were three besides Mr. Bost who were parties to the lease, Bost, Swissler, Hensen and Larsen. Larsen was not mentioned relative to being at the claim at the time that Mr. Bost was in there. He

(Testimony of R. C. Lynn.)

said the first time he ever saw Larsen was when the three came to his home at the time the lease was drawn. I do not believe he explained just what occurred at the mine on the day that he was there with reference to the claim, or whatever it was, with reference to any operation on that day. I do not believe there was anything said by Mr. Bost relative to him taking any specimens or pannings of gravel. I believe he told me Hensen always brought the gold in sponges or amalgam cake form, retorted. As to the manner in which he would finance the payment of Hensen for the lessees' share I asked him if Hensen would wait until the return had been received from the Mint and Bost said he would not, that Mr. Hensen would not wait, that he and Mr. Bost estimated the value of the gold and he would pay Hensen thereupon 90 per cent. of such estimated value; that if he did not have enough money on hand he would borrow sufficient funds from some of his relatives and then reimburse the relatives when he received his returns from the Mint. I had a discussion with him as to the last time that he saw Mr. Swissler. I do not recall definitely whether that was on August [58] 24 or September 18. Mr. Bost said the last and only time he had seen Swissler before the lease was drawn was approximately three years prior to the date I was questioning Mr. Bost, when Swissler came to his home in Nevada City. He told me that was the last time that he saw Swissler. He told me where he first knew Swissler. He said he

(Testimony of R. C. Lynn.)

had met him in Trinity County about 1886. He said that approximately five or six years prior to 1936 Swissler came to him and said that he had located a profitable claim and needed some money to start work, and Mr. Bost said that he had advanced Mr. Swissler several hundred dollars. He did not say that he thereafter advanced some more money. When I questioned him as to the approximate amount he had advanced, the total, he fixed the figure as approximately $500, and nothing was said whether that had all been advanced at the same time or over a period. I did not question him when he made the last advance. There was not anything said about him making an advance at the time that he went over to the claim. As to the arrangement between him and the other men, with reference to the ownership of the claim, as I recall, he only said at the time they came to him and wanted to draw a lease they said they considered him the owner. The reason for considering him the owner was not discussed. After I had talked to Mr. Bost I then proceeded to make certain investigations relative to whether or not this claim was recorded. I went to Rattlesnake Bridge. From there I went in the direction that Mr. Bost had described. The conversation with Mr. Bost on September 18 was after I had made various attempts to locate the mine. I told him at that time I could not locate it. I don't know as I told him exactly where I had gone. I told him I had made a search for it and that I could not find it. I

(Testimony of R. C. Lynn.)
told him that I had not been able to locate it; whether or not I told him who, or if I discussed it with other persons or not, I would not say for sure. I would not say I did or [59] did not. Possibly I did. I can't say what he said, because I don't recall if I told him. When I told him that I was unable to locate it I then told him that I wished to ask him further questions about it, and he said he would answer them. That is when the sworn statement was taken. In my discussion with him relative to his trip with Hensen to the claim I do not recall that he mentioned that the tunnel that was there was a tunnel that was recently constructed, or that it was an old abandoned one. I do not recall discussing whether or not the tunnel was the result of the present development.

The next witness for the Government was

LAWRENCE BONES,

who testified under oath as follows:

Direct Examination

(By Mr. Murman.)

I have been residing in Eldorado County since 1888, and reside in Georgetown and vicinity. I have mined and prospected north of Georgetown. I have never during that period of time heard of Cougar Gulch or Cougar Canon, or the Lucky Gravel claim.

Q. Did you ever hear of Hans Hensen, G. A. Swissler or Larry Larsen?

(Testimony of Lawrence Bones.)

A. No.

Mr. Coughlin: To which we object on the ground it is immaterial, irrelevant, and incompetent, and calls for the opinion of the witness, and is hearsay.

The Court: Overruled.

Mr. Coughlin: Exception.

(Exception No. 9.)

I am now residing in Georgetown and am familiar with the mining that is going on there. [60]

Cross Examination

(By Mr. Coughlin.)

There are mining claims in the vicinity of Georgetown where I prospected that have been abandoned. I could not tell you the names of all of the abandoned claims. However, there are claims in there that have been abandoned.

The next witness called for the Government was

CLARENCE COLLINS,

who testified under oath as follows:

Direct Examination

(By Mr. Murman.)

I am a garage owner and service station owner in Georgetown, Eldorado County. I am connected in an official capacity with the county as Deputy Sheriff. I have been Deputy Sheriff for about three years. I have been residing in Georgetown and doing busi-

(Testimony of Clarence Collins.)

ness there since 1922. During that period I have had occasion to go into the surrounding country. As a Deputy Sheriff and in carrying on my business I have covered the biggest part of the district, that is, the Georgetown District. I have never run across or heard of Cougar Canon, or any mining claim known as the Lucky Gravel claim. I have never heard of Hans Hensen, G. A. Swissler or Larry Larsen as miners in that district, or in any way to my recollection. I have resided in that district continuously for all the time I have told you about.

Cross Examination

(By Mr. Coughlin.)

Swissler, or Hensen or Larsen could have been there and I not know about it.

Redirect Examination

(By Mr. Murman.)

The population of Georgetown, itself, is approximately 400. [61] The population of Eldorado County is about 8000. I believe I would know all of the miners in that vicinity at the time I have referred to.

The next witness for the Government was

ELMER C. OGLE,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am a miner and a mail carrier. I reside about eight miles north and east of Georgetown by trail, in the vicinity of Volcanoville, Eldorado County. I have lived in that district about twenty-nine years. During that period of time I have been occupied as a miner and part of the time as mail carrier and have traversed the surrounding country, I should say within an eight or ten-mile radius of Volcanoville. Outside of that particular area, I was never in there prospecting, but I have been over the country as a hunter. I believe that nearly every miner that comes into that country comes down to our place to inquire about the country; they generally hunt me up to get information. I never heard of Cougar Canon or the Lucky Gravel claim.

Q. Did you ever hear of Hans Hensen or G. A. Swissler, or Larry Larsen as miners in that area?

Mr. Coughlin: We will interpose the same objection as we have heretofore.

The Court: Overruled.

Mr. Coughlin: Note an exception.

(Exception No. 10.)

A. No.

I have been mining for twenty-five years, and during that period of time have mined gravel claims as

(Testimony of Elmer C. Ogle.)

well as quartz claims. [62] During that period of time, the last five or six years, I should judge, I have handled three or four thousand yards at least. A yard of gravel is about comparable to 1½ tons. In handling that quantity of gravel I have separated the gold from the gravel and have disposed of the gold. I have noticed the proportion of the quantity of gold to the cubic yard of gravel.

Q. Are you familiar also with other mining activities in the vicinity where quantities of gravel have been handled besides the quantity that you are particularly familiar with?

A. Well, during my time there has not been very much gravel mining outside of our own.

Mr. Coughlin: We ask that the answer be stricken out on the ground it is not responsive.

The Court: Denied.

Mr. Coughlin: Exception.

(Exception No. 11.)

The Court: Q. You say there has not been much gravel mining outside of our own. What do you mean?

A. I mean there has been no real mines or no real producers since I came to the country, outside of our own.

Q. The mine you own?

A. The mine we own.

Mr. Murman: Q. What do you mean by "real producers"?

(Testimony of Elmer C. Ogle.)

A. Well, something that a man can make a living out of.

Q. How much would that run per cubic yard?

A. It would run all the way from 10 cents to 50 cents a yard.

Mr. Coughlin: I am going to ask that that answer be stricken out and my objection go before the answer.

The Court: I am wondering why you want that stricken out.

Mr. Coughlin: Why question this man about this matter at all?

The Court: He is trying to qualify him as an expert on placer mines or gravel mines. [63]

Q. Have you worked in other gravel mines in that country?

A. No, not in gravel mines, I have in quartz.

Q. The only gravel mine you know about is the one you work, yourself?

A. The one I work, myself.

Mr. Murman: Q. You say that is the only gravel mine in that vicinity that you know of?

A. That is at the present time no, there is gravel mining, but that is the only mine that has been worked on a profitable basis in that vicinity since we came into the country.

The Court: Q. When was that? When did you come into the country?

A. 28 years ago.

(Testimony of Elmer C. Ogle.)

Mr. Murman: Q. Mr. Ogle, basing your answer upon your experience and knowledge of mining, will you state to the Court and Jury what the average production per cubic yard of gravel or per ton of ore is in that vicinity?

Mr. Coughlin: Just a moment, we object to that on the ground it calls for the conclusion and opinion of the witness and the proper foundation has not been laid.

The Court: Sustained. I do not think the proper foundation has been laid.

The next witness for the Government was

ROBERT MURDOCK,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am a lookout for the Forest Service the greater part of the year, for the United States Government. I am stationed at the present time about fourteen miles east of Georgetown by road. I have been on that station about sixteen seasons, consecutively. My station is called Lookout Station, the elevation is 4613 feet, [64] and I have a clear view of the surrounding country. Looking west when there is no fire to make a smoke screen we can see clear across the Sacramento Valley there, which I would say is about fifty miles, and looking east you can look as

(Testimony of Robert Murdock.)

far as the Sierra Nevada Range, twenty miles. That is the highest point going east from Georgetown until you get higher in the Sierra Nevada Mountains, where there are three or four other lookouts higher than that. As lookout for the United States Forest Service I am required to have a knowledge of the surrounding topography of the country. From the point I have designated as my lookout point I would say I was entirely familiar with the surrounding country in a radial area of 15 miles. Beyond that immediate vicinity that I am entirely familiar with I have a knowledge of a further district in some direction. I have never heard of Cougar Canon in that vicinity, or the Lucky Gravel claim. I see a few prospectors and miners but I do not get acquainted with a great many of them. I have never heard of or met Hans Hensen, G. A. Swissler or Larry Larsen.

Cross Examination

(By Mr. Coughlin.)

I see prospectors and miners in the vicinity about Georgetown but not from the station occasionally. I see men there whose names I do not know.

Redirect Examination

(By Mr. Murman.)

When I am not on the lookout station I live in Georgetown. I have not only been occupied with my business in that way, but I have resided there for ten years. [65]

The next witness for the Government was

WILLIAM CAMPBELL,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am just a laborer. I am mining a little, that is, working in a quartz mine. I have done some mining, always in Placer County. Placer County adjoins Eldorado County. I reside in Forest Hill. I have been there about ten years and have been on the Divide all my life, right close in that vicinity. I am not familiar with Eldorado County. The Divide is Forest Hill and all those little mining towns around there. I should say Forest Hill would be about somewhere around twenty miles from Georgetown. As the crow flies, it is pretty near south. During the time I have resided there in the vicinity of Georgetown I never have heard of Cougar Canon or the Lucky Gravel claim.

Q. Have you ever run across a man by the name of Hans Hensen, G. A. Swissler, or Larry Larsen, miners in that area?

A. No.

Mr. Coughlin: Just a moment. We object to that on the ground it calls for a conclusion or opinion as to whether he ever run across them. There is no foundation laid here to show that this man may have known them.

(Testimony of William Campbell.)

The Court: He has lived on the Divide all his life. Overruled.

Mr. Coughlin: Exception.

(Exception No. 12.)

Cross Examination

(By Mr. Coughlin)

I do not know the names of all of the prospectors who prospect or mine in Eldorado County. [66]

The next witness for the Government was

EDWARD N. RAINES,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am on lookout at the Forest Service up there in the summer time. When not working as a lookout I reside at Forest Hill, which is about twelve miles north of Georgetown, across the American River in Placer County. My station is about fifteen miles from Bald Mountain, where Murdock was. In my business as lookout at that point I am pretty much familiar with the topography; I am familiar with it to the west quite a distance, down toward Sacramento, Roseville and Auburn, which would be about 50 miles, east about 12 to 15 miles, and south quite a distance. I have done mining up there on my own

(Testimony of Edward N. Raines.)

behalf and am familiar with some of the old mines in that area. I am not familiar with the present workings a great deal; there is not very much present working going on, only snipers; they are fellows that are working in canons and places where they might find something. Most of the mining in Placer County, the gravel mining is in the creeks. During the depression quite a lot of snipers came in; that goes back six or seven years. I do not know of any sniper operations or other operations on a claim known as the Lucky Gravel claim; I don't know where that is, I never heard of that claim at all. I never ran across any snipers or miners by the name of Hans Hensen, G. A. Swissler or Larry Larsen.

The Court: Q. Did you ever hear of Cougar Canon?

A. Yes.

Q. Where is Cougar Canon?

A. Well, now, you have got me; when I was a young man there was some hunters in there, and they had a dog that got pretty well scratched up with a California lion, and it was said that that happened in Cougar Canon. A couple of years ago they asked me where Cougar Canon was and I told them I [67] thought Cougar Canon was tributary to Long Canon, and then I asked somebody else and they seemed to think it was tributary to Duncan Canon; that was a couple of years ago, when this question was put up to me about Cougar Canon.

Q. Who put it up to you?

(Testimony of Edward N. Raines.)

A. Somebody from the Forest Service asked me over the phone.

Q. In what county?

A. In Placer County, in the Forest Hill District.

I have never seen a place called Cougar Canon. Outside of the fact that I heard of it when I was a boy and had this call over the telephone I never heard of it in late years at all. I have lived in that vicinity all of my life.

Q. Mr. Raines, in the Cougar Canon which you mentioned to the Court, have you ever heard of any mining in that canon?

A. Well, that is a question, because I don't really know where that is, whether it would be in Long Canon or Duncan Canon. I never heard anybody say they were mining in Cougar Canon. The only time as I say I ever heard about Cougar Canon was when these hunters had that dog scratched up. That was when I was probably ten years old, 48 or 50 years ago. In the intervening period of time up to the time I had a call on the telephone about it I never heard of it. They asked me where it was and I told them I thought it was tributary to Long Canon, and they seemed to think it was tributary to Duncan Canon. I would not say when I received that call over the telephone, whether it was two years ago or when. It was not this last season, it was either a year ago or possibly two years ago.

(Testimony of Edward N. Raines.)

Cross Examination

(By Mr. Coughlin.)

The time I got the call it was being talked around of where Cougar Canon was, and some other person had the idea it was [68] up by Duncan Canon. I always had the impression it was connected with Long Canon. I know where Rattlesnake Bridge is; Long Canon would possibly be 30 miles from Rattlesnake Bridge. I had the impression that Cougar Canon was over in the vicinity of Long Canon. I do not know whether there have been mining operations over in Long Canon. I did not get acquainted with any of the snipers and miners because I was up higher, and if someone did not feel sorry for me and come up to see me I would not see anybody. I know the Griffin Mine over in Long Canon; that was quite a mining operation years ago; it is pretty much deserted now.

Redirect Examination

(By Mr. Murman.)

With regard to Cougar Canon that I have referred to, I don't know how many persons told me that it was in the vicinity of Duncan Canon; no more than one or two; and I could not even remember who it was that told me it was in Duncan Canon. I do not think it was in the message that I received over the telephone that the reference was made. From where I was located in the summer months, in order to get to Long Canon or Duncan Canon you

(Testimony of Edward N. Raines.)

would have to go by automobile or horses or some way down the road. There is no road down to the canon. There are roads on the ridges that come on the high ground between the canons. There is a road that crosses at French Meadows across the Little Fork of the American River, and comes out at Georgetown. There are lots of roads between Rattlesnake Bridge and Long Canon. There are roads leading from Rattlesnake Bridge connecting with the roads on the high portions of those canons. You could go by automobile as well as by horseback or any other way. That would be in the summer months. In the winter months you would not be able to do that. If you got in the high mountains in the snow you might have to go in some other way. In [69] the summer months you could use the roads. In going from Rattlesnake Bridge up to Duncan Canon and Long Canon you would have to cross the county roads if you followed the ridges.

The next witness for the Government was

E. L. SCOTT,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am County Assessor of Eldorado County, and have been since January, 1923. I have resided in

(Testimony of E. L. Scott.)

Eldorado County since 1898. My residence has been continuous up to the present time, with the exception of about four months in the year 1903, I believe. During that period I have never heard of Cougar Canon or the Lucky Gravel claim. I never heard of Hans Hensen, G. A. Swissler or Larry Larsen; I don't remember those names. I am familiar with the assessment rolls of the county; they are kept under my supervision and in my custody. There has not been any tax assessment on any such claim as the Lucky Gravel claim in Eldorado County; there has not been any tax assessment against any individual by the name of Hans Hensen, G. A. Swissler or Larry Larsen or Ben A. Bost.

The next witness for the Government was

HENRY LAHIFF,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

At the present time I am County Surveyor of Eldorado County. I have resided down in Auburn, Eldorado County for about 40 years. I have been away for three or four years down in Santa [70] Cruz and over in Europe for a year and a half. The bulk of the time the last four years I have resided in Eldorado County. I have been County Surveyer

(Testimony of Henry Lahiff.)

for the last three terms, about fourteen or fifteen years. I am very well acquainted with the vicinity of the county around Georgetown. I have not been in Volcanoville for over twenty years, but I am familiar with the country up there. Basing my opinion upon my familiarity with the country, there is no canon that I know of called Cougar Canon; there may be canons called Cougar, which probably would be some local name, but in my forty years residence in Eldorado County I have never heard of Cougar Canon. I have never run across a claim known as Lucky Gravel claim. I become familiar with miners in the County during my incumbency as County Surveyor. I never heard of any miners by the name of Hans Hensen, G. A. Swissler and Larry Larsen. I never heard of a man by the name of Ben A. Bost owning a mining claim in Eldorado County.

The next witness for the Government was

JOHN A. SHIELDS,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am County Surveyor of Placer County, California, and have been about sixteen years. I have resided in Placer County during that time and prior to that time. Prior to being County Surveyor I followed general engineering work for many years,

(Testimony of John A. Shields.)

and also mining. As County Surveyor I am familiar generally with the topography of Placer County, and have some familiarity with the adjoining county, Eldorado, where it immediately adjoins Placer County. I would say Forest Hill in Placer County and Georgetown in Eldorado County were about equidistant from the [71] dividing line of the two counties. Those two places, as the crow flies, I would say are about twelve miles apart. I have never heard of Cougar Canon in Eldorado County or Placer County, nor of a mining claim in that area known as the Lucky Gravel claim. I have been more or less familiar with the mining activities and have met a great many miners during the time I have gained my familiarity with mining activities. I have never heard of or run across Hans Hensen, G. A. Swissler, or Larry Larsen; I never heard of Ben A. Bost, a miner, in that area.

Cross Examination

(By Mr. Coughlin.)

I don't know, as a matter of fact, whether a man by the name of Swissler ever conducted any mining operations in Eldorado County or not. He could have and I not know it.

The next witness for the Government was

J. C. ACKLEY,

who testified under oath as follows:

Direct Examination

(By Mr. Murman.)

I am in the general merchandise business in Georgetown, Eldorado County. I have been a merchant there since 1909; I have been in that section much longer than that. I have been in that section since 1895. I was in Volcanoville for a number of years; that is in the same county. I am fairly well acquainted with the surrounding country around Georgetown. I have sold merchandise to people in that area. I was fourteen years ago in Volcanoville and I had a store there, too, that is eight or nine miles north of Georgetown. I never have run across Cougar Canon in that area, never heard of it. I never have run across a mining claim or heard of a mining claim known as the Lucky Gravel claim. In [72] my general merchandise business in Georgetown I have sold supplies to various miners and have met most of them, I should say. I never did much grubstaking. I have never met Hans Hensen, G. A. Swissler or Larry Larsen, miners in that area, and I have never known of Ben A. Bost, miner in that area.

Cross Examination

(By Mr. Coughlin.)

I do not know how far Georgetown is from Rattlesnake Bridge, exactly. I would say it was

(Testimony of J. C. Ackley.)

about 12 miles. It would be farther than that by the highway. In a direct line it would be ten or twelve miles. I could not say that a man by the name of Swissler did not engage in any mining activities in Eldorado County in the last seven years. As to a man by the name of Hans Hensen engaging in such activities during that time, all I could say is I never knew anyone by that name. They could have been in there and I not know it. In fact, people come in there I do not know.

Redirect Examination

(By Mr. Murman.)

I don't think it would be very long for a person to be in the vicinity of Georgetown mining and buying supplies before I would become acquainted with him. If he was doing any extensive mining I would say I would know him, more so than if he was a prospector, you see, then, they might be there for a longer time and I know them; at least, I might see them and not know their name.

The next witness for the Government was

SARTOR J. FRANCIS,

who testified under oath as follows:

Direct Examination

(By Mr. Murman)

I am a butcher in Georgetown. I was born and raised there, [73] and have been a butcher over

(Testimony of Sartor J. Francis.)

thirty years. I had occasion as a boy, and later on, to go into the surrounding country. I am familiar with the country around Georgetown, up about fifteen miles and beyond that, I have been clean up to Lake Tahoe horseback; all over that country. I have tramped through the country. I have a place about 40 miles from Georgetown on the mountain range up there; that is northeast from Georgetown. I have never run across Cougar Canon during my tramps in that area. I never heard of Cougar Canon. I never heard of a mining claim in that area known as Lucky Gravel claim. I have met quite a few miners that worked around Georgetown; a number of them trade at my shop. That includes the years 1934 and 1935, and also earlier, going back to 1929 and '30. During that time I never heard of a miner or several miners known as Hans Hensen, G. A. Swissler and Larry Larsen. I never heard of Ben A. Bost, a miner in that area.

Cross Examination

(By Mr. Coughlin)

I might not have heard of Mr. Swissler being in there, but he could have been there without my knowing it, but he could not have stayed very long. I generally get acquainted with a lot of those fellows that come in there. It has happened that men came in to mine that I did not know.

The next witness for the Government was

CHARLES B. RICH,

who testified under oath as follows:

Direct Examination

(By Mr. McWilliams)

I am an agent of the United States Secret Service and have been connected with the United States Secret Service eleven years. The United States Secret Service protects the Mint [74] against thefts and embezzlements, violations of the regulations that pertain to the thefts of gold, embezzlements of gold, and my duties cover counterfeiting. I am the Mr. Rich who was referred to by Mr. Lynn. I accompanied Mr. Lynn on the search that he made in the vicinity of Georgetown and north of Georgetown for this alleged Cougar Canon. We started out first at Forest Hill, which is about twelve miles on the Georgetown road, that is the one that goes across the canon from Georgetown northeast, and about twenty some miles by road. We then went into Georgetown, made inquiry at the post office, and met a supervisor by the name of McFadden, and we inquired of him concerning any information he could give us of Duncan or Cougar Canon, or of the Lucky Gravel claim; we also inquired the way to Long Canon and to Duncan Canon. After receiving those instructions we proceeded to the station just under Duncan Peak; from there we went into a place known as the Big Trees, about nine miles from this ranger station. We then went down a trail at-

(Testimony of Charles B. Rich.)

tempting to get into Duncan Canon and attempted to locate a man who had a mine. We next went into the place by French Meadows, which is on the same road, about twenty miles further along. Mr. Lynn and myself came down from a place called Smith House, I believe it was, went down the American River again, trying to get into Duncan Canon, and we were unsuccessful. We made inquiries of miners, anyone whom we came across en route to this place, attempting to locate the Lucky Gravel claim, or Cougar Canon. We made inquiry concerning anyone by the name of Swissler, or Hensen, or Larsen, and asked them if they knew anything of a man by the name of Bost, who owned a claim over in that particular section. We were unable to find either the mine or the canon. I made an inspection before that with Inspector Bongard. Mr. Bongard is the high grade inspector for the State Division of [75] Mines. Mr. Bongard and I started our investigation from Placerville. Mr. Bongard was assisting the Government and the Government was assisting him; in other words, we were working in conjunction. We searched the records of the Assessor's Office, contacted the County Surveyor of Placerville in an effort to locate Cougar Canon and the Lucky Gravel claim; we searched the voters' record and the assessment record for Swissler, Hensen and Larsen, that were shown on the purported lease of Mr. Bost, also for Mr. Bost, and being unable to find any information there we proceeded to Georgetown, where we

(Testimony of Charles B. Rich.)

made inquiries of various people that have testified here; we talked with every person that we came in contact with, trying to find Cougar Canon and the Lucky Gravel claim. We then went on to Volcanoville, where we interrogated the postmaster and had all the records searched at the post office, and also inquired of Mr. Ogle and his brother if they could give us any information of Cougar Canon or the Lucky Gravel claim. We were unable to find anything. We then went on to a mine which was right at the head of Duncan Canon, I cannot recall the name of it. We then went into French Meadows and talked with Mr. Olinger, of the Forest Service, who had been in that country for seven years, attempting to get the location of Cougar Canon or the mine, and were unable to do so. We went on around Forest Hill and interrogated everyone we came in contact with, both rangers and cowboys, and everybody else, and were unable to get any information concerning Cougar Canon or the mine. When we arrived in Forest Hill we talked over the telephone to Mr. Raines. At that time I do not recall that he could give me any information about Cougar Canon. We contacted other people in the vicinity of Forest Hill, amongst them a man by the name of Bisbee, who thought he might have heard of the canon, such as Mr. Raines described, and told us that he would be able to take us into it. [76] However, he never could do so. No one in all of our travels could give us any information as to the location of the Lucky Gravel

(Testimony of Charles B. Rich.)

mine, or Cougar Canon. At that particular time we spent two days on that search. During the period from the 27th of August until the middle of November we were continually on this case and other cases of the same nature, and we made inquiry of nearly all the people we came in contact with, attempting to locate this particular canon and mine in that vicinity. We were not in that same vicinity every day. We were in Garden Valley and in through the section which lies between Georgetown and Forest Hill, and made inquiries there; we checked with officers, we checked with everyone we thought could give us any information as to Mr. Swissler, or Mr. Hensen, or Mr. Larsen, and tried to find the location of the Lucky Gravel claim and Cougar Canon, without any success whatever. I know where Mr. Bost's place of business was in Nevada City.

Q. What was the character of the establishment that was being operated by him at that time in Nevada City?

Mr. Coughlin: To which we object on the ground it is immaterial, irrelevant, and incompetent, no time, place, or anything else fixed.

The Court: Overruled.

Mr. Coughlin: Exception.

(Exception No. 13.)

Right after he was arrested on the 30th of September Mr. Bongard and myself called on him at

(Testimony of Charles B. Rich.)

Nevada City, at which time I requested him to allow me to look in his place of business. He invited us in, and personally pointed out the office and the back part of the office. The front part of the office consisted of a desk and safe, and a pair of gold scales, scales you weigh gold on; immediately in the rear of it was a small room which contained a melting furnace and grinder, an electric equipped grinder. A [77] grinder is a mill which consists of a round iron or metal sort of tube. In this is mounted a machine with little shoes on it. This is run by electricity. Ore, after it has been ground to a certain fineness, is put in that mill, the electricity is turned on and it is ground to a very fine consistency. I may be wrong in that description, but the result of that is a mixed quicksilver bath and the gold is amalgamated from the ore that is in that bath.

Q. Do you know why the grinder is used?

A. I do.

Q. Do you know—"Yes" or "No"?

A. Yes.

Q. Will you tell the jury?

A. The grinder is used to grind quartz rock.

Q. What kind of quartz rock?

A. Quartz rock which bears the gold.

Mr. Coughlin: I object to that.

The Court: Overruled.

Mr. Coughlin: Exception.

(Exception No. 14.)

(Testimony of Charles B. Rich.)

It could be used for either low-grade or high-grade. It is usually used for high grade. I am testifying from my own knowledge.

Cross Examination

(By Mr. Coughlin.)

I did not see this grinder used at any time for the purpose of grinding in Mr. Bost's place. I met Mr. Bisbee at Forest Hill. I talked with Bisbee with reference to Cougar Canon. He told me that he believed he knew where there was a canon that had been called Cougar Canon. Then I had him try to take me there and he could not find it. He said he believed he knew of the canon. He took us down below the big trees, that is, Mr. Lynn and myself, down into a canon of the American River where [78] he said he thought that a trail would take us into it. He looked for the trail. I never found the trail. I believe that was on the second trip, it was sometime about the 11th or 12th of September. That was before I talked to Mr. Bost. I did not discuss that with Mr. Bost at the time I talked to him. I did not tell him I had tried to find this canon, nor that Mr. Bongard and I had been endeavoring to locate the canon. That was in 1936, in September. We went into Long Canon. There are several mines in Long Canon. That is a long territory. We did not cover the whole length of Long Canon, only that part which was adjacent to Georgetown. I would say Long Canon is about twenty-five miles long. We

(Testimony of Charles B. Rich.)
were walking in there. I saw in Long Canon what is known as the Goggins Mine, that is the one I could not remember.

(Thereupon an adjournment was taken until Wednesday, November 24, 1938.)

CHARLES B. RICH

testified as follows:

Redirect Examination

(By Mr. McWilliams.)

Q. Mr. Rich, on your cross-examination you were asked by Mr. Coughlin whether you had certain conversation with Mr. Bost along certain lines, or whether or not you did tell him certain things, and you said no. Will you explain why those matters were not gone into?

A. Mr. Bongard and I called on Mr. Bost, as I testified, for the purpose of talking to him, and we started to ask him some questions, and he said he did not care to answer any questions, he would state it to the Court when the time came.

Recross Examination

(By Mr. Coughlin.)

Q. Mr. Rich, I believe you testified yesterday with respect [79] to what you designated as a grinder in Mr. Bost's assay office. You also saw the scales of the assayer there, too, didn't you?

(Testimony of Charles B. Rich.)

A. I saw large gold scales, a large balance they weigh the gold with.

Q. Used by assayers?

A. Well, it is used by assayers and gold buyers.

Q. You know that Mr. Bost had been engaged in the assaying business in that county, don't you?

A. Yes.

Q. And you know that he had also been engaged as a licensed gold buyer in that county, don't you, up to 1931?

A. Yes. I do not know that, I have no knowledge except from the records.

Q. But you learned that from the records?

A. Yes.

Q. You also learned that he had been engaged in the assaying business up to about 1934?

A. Yes, that is correct.

Q. You referred to the fact that some particular machine or apparatus there was connected with, that is, there was electricity referred to in connection therewith by you.

A. I believe that I testified that the mill was ordinarily run by an electrical motor.

Q. Did you examine this to see if there was any electrical connection therewith at the time you were there?

A. No, not especially.

Q. Then, as a matter of fact, you don't know whether it was connected up electrically or not?

(Testimony of Charles B. Rich.)

A. I could not say that. It could have been run by electricity, or a gasoline engine, or water power.

Q. Well, as a matter of fact, did you determine during the time when Mr. Bost was actually engaged in operating that prior to the time when he ceased his assay business that it was run by a water wheel?

A. I was informed by Mr. Bost that it was, yes.

[80]

The next witness called by the Government was

CLYDE M. LAIZURE

who testified under oath as follows:

Direct Examination

(By Mr. McWilliams)

I am a mining engineer employed by the State Division of Mines. I have been connected with the State Division of Mines since 1917 as district mining engineer. I graduated from the School of Mines in Metallurgy, from the University of Missouri, in the class of 1905, and I have been in that business ever since. My duties in my present position are partly office duties and partly field duties. My field duties are connected with visiting the various counties in my district, and securing the mines and mineral resources of them. In that connection I usually visit the Recorder's Office and list all of the claims recorded there for our records. In order to

(Testimony of Clyde M. Laizure.)

keep our records as complete as possible on all of the mineral resources and mining claims in the State we usually check with the Assessors, with the County Recorder's Office, and list all of the claims that are on their tax list, assessment list, and in the Recorder's Office the location of them, and the ownership, to whom they are assessed. I have done that whenever I have been in the field. As a mining engineer the dimensions of the average mining tunnels in the State of California in the Sierra Nevada Mountains vary considerably; about 5 by 7 feet would be about the average. Assuming a tunnel in the mountain a thousand feet deep, with that average tunnel 5 by 7, an approximate estimate of the cubic yards of material taken out would be 35,000 cubic feet. After that ore is taken out from the tunnel there is ordinarily an expansion in volume; broken ore is always expanded in volume, 25 to 40 per cent., depending on the character of the material. As a result of my experience with the mining industry in this State, I should [81] say that a mining property that produces over a considerable period of time gold running .56 ounces per yard, referring to gravel mine, is highly valuable.

Cross Examination

(By Mr. Coughlin)

Eldorado County is not in my district. I have no record of how many mining claims are recorded in Eldorado County. In the State of California mining

(Testimony of Clyde M. Laizure.)

claims have been recorded ever since 1849, in the different recorders' offices, and many of them have been recorded over and over by different locators where they have been abandoned. The number must run into 75,000 or more. That is just a pure guess. I do not know how many of those are in Eldorado County, nor in Placer County. Neither county is in my district. My district is from Mendocino down to San Luis Obispo and San Joaquin County and Mariposa. I do not have anything to do with this district around Placerville and Auburn and Georgetown.

Redirect Examination

(By Mr. McWilliams)

Q. In your experience over the years, will you state how many gravel mines you have run across or become familiar with that run as high in gold as .56 ounces per cubic yard?

Mr. Coughlin: I object to that. I do not see the relevancy of it.

The Court: Overruled.

Mr. Coughlin: Exception.

A. I don't recall any.

(Exception No. 15.) [82]

The next witness called for the Government was

JOHN BONGARD,

who testified under oath as follows:

Direct Examination

(By Mr. McWilliams)

I am high grade inspector of the State Division of Mines. I have held that position for ten years. I have charge of the issuance of all of the licenses to gold buyers and the investigation of general high grade conditions. Highgrading is ore stolen from various mines. I know the defendant in this case, Mr. Bost; I first met him some eight or nine years ago in Nevada City. The first time I met him with reference to this case was after he was arrested sometime after the 1st of October, 1936, in Nevada City. Mr. Rich was with me, and we asked permission of Mr. Bost to inspect his plant on Broad street, or his office. I had had connection with the case in the way of investigation prior to that visit. In August, 1936, in company with Mr. Rich I made a trip from Placerville to Georgetown, from Georgetown to Volcanoville, down to the Goggins Mine, up to French Meadows, around to Salt Flat and back down to Forest Hill; the distance covered on that day was about 90 miles, and en route we stopped at the various little towns and made inquiries in reference to Cougar Canon, the Lucky Gravel claim, and also asked various ones if they knew a man by the name of Hans Hensen, G. A. Swissler, and Larry Larsen. We did not go beyond French Meadows;

(Testimony of John Bongard.)

there was no road in there; we were driving on that particular day; we went out to French Meadows, and from there the road goes through Salt Flat, back down to Forest Hill. We did not get 40 miles beyond Georgetown. I would say we got about 20 miles north of Georgetown. Then we stopped at the ranger station at French Meadows and made inquiry, and met a couple of cowboys along there [83] herding cattle, and made inquiries in regard to Cougar Canon, the Lucky Gravel mine, and the individuals mentioned before, but were unable to locate them. We examined the records of the County Recorder's Office and County Assessor's Office for the Lucky Gravel Mine, and also for the names of Mr. Bost, Mr. Swissler, Mr. Larsen and Mr. Hensen, both at Placerville, which is the County Seat of Eldorado County, and Auburn, the County Seat of Placer County. We found no record either of the mine or the men mentioned. We then came down to Forest Hill and we made inquiry there from the Forest Ranger, and also at Georgetown we made inquiry from the Deputy Sheriff, and from some of the old-timers around that section of the country, as to whether they knew anything of Cougar Canon, the mine, or the individuals, and we found no one in Georgetown that knew anything about the mine or the individuals, but at Forest Hill we ran across a man by the name of Bisbee, who thought he knew where Cougar Canon was located. We thought it was in the vicinity of Duncan or Long Canon. Mr.

(Testimony of John Bongard.)

Rich made an appointment with Bisbee at a later date to take him to Cougar Canon, I mean to Duncan or Long Canon, in search for this Cougar Canon, which he thought was there. I did not go with him on the trip. As time went on, we were on this investigation for six or eight months, not on this particular one, but on various investigations, and occasionally we would go back to that region on the southerly end of the county, and through there, and we made inquiry from time to time if anyone knew or heard of Cougar Canon, without any success. We were gone two days on that first trip north of Georgetown. Around the 1st of October, 1936, shortly after Mr. Bost was arrested, we met him and asked his permission to visit his office; we went into the office, and in the front part of the office there was a desk, and I believe a cot in there, a big gold scales, [84] and the back of the office was equipped with crushers and an about four-foot grinding pan and retort, and I believe a melting pot. We asked him questions and he said, "I will tell that to the Court, to the Judge."

Cross Examination

(By Mr. Coughlin)

We talked to Mr. Bost around the 1st of October, I believe, shortly after he was arrested, 1936. We met Mr. Bost coming out of the post office. We said Mr. Rich and I would like to look at his office, and he told us he had no objection. We had been up

(Testimony of John Bongard.)

there at that time and made a search for the Lucky Gravel claim. We did not discuss that with Mr. Bost. We asked him a question with regard to it, and he said, "I will tell it to the Court or the Judge," and we dropped it. We had no conversation with him save and except the conversation relative to the request to view his place. When we got there and asked the question he said he would tell it to the judge, and we dropped it. On this trip we went past the Goggins Mine. It is located on the Eldorado County side on the road going up there. I think it is in Long Canon. I think the road goes up the hill from the Goggins Mine and you have to go down to the Goggins Mine. In going to the Goggins Mine I believe we had to cross the Rubicon River. There are a number of canons that run down; that is a big country in there. I believe it was two cowboys that we met. That is all the cowboys we saw. I don't remember that we talked to any miners. We talked to quite a number of people in Forest Hill; we talked to a man named Bisbee and another man that camped around there where we stopped, and several other individuals around there. The Forest Ranger we talked to has been a witness. We did not bring Mr. Bisbee. Mr. Rich and Mr. Lynn went with Mr. Bisbee to make a search for the place that he [85] thought was Cougar Canon. Mr. Bisbee thought he knew where Cougar Canon was. Mr. Bisbee was not brought here as a witness. I knew about him but as to imparting that information to the United States

(Testimony of John Bongard.)

Attorney, Mr. Rich handled that. I did not talk to Mr. Raines. Mr. Rich talked to him over the 'phone. We brought the man where he stopped, he was one of the witnesses. I don't remember who else we talked to at Forest Hill. Mr. Rich took the names of the individuals; we were both together and interviewed them. We were investigating two days; the entire trip covered two days. We did not go back to that particular part on this particular case. We were there on other business, and if the case came up we would ask if they knew where Cougar Canon was, or ever heard of it. The persons whom we talked to who told us that they did not know of or never heard of Cougar Canon, the oldtimers, we brought them here as witnesses. We didn't bring all the persons we discussed the location of Cougar Canon or the Lucky Gravel Mine. There were a lot more that we talked to. We did not subpoena all the witnesses. Some of them that were snbpoenaed could not get out, as I understand it, they were snowed in. I have no record of those who could not get out, I just heard of it. I believe Mr. McWilliams has that record. We examined the records at Placerville and Auburn. We did not ask for the number of mining claims that were recorded, we asked whether there was a claim under the name of Lucky Gravel claim, or any record in the name of Ben A. Bost. We did not look at the records, we went to the County Recorder and were right there when he looked them up, we stood right there with him when

(Testimony of John Bongard.)

he looked them up. I did not accompany the recorder when he went to look at the records or the index of the claims. We did not make any effort to determine whether or not there could have been a claim known as the Lucky [86] Gravel claim recorded under another name. It would be impossible to do that.

Redirect Examination

(By Mr. McWilliams.)

On that first trip or on our subsequent trips, over a period of a couple of months, I would say that we talked to anywhere from 30 to 40 people. No one other than Bisbee had any knowledge or information with regard to any of these names. I did not talk to Mr. Raines. I have had experience in mining. I have been with the Mining Department ten years. I have examined the five affidavits that have been offered in evidence and noticed therein the number of cubic yards from which the gold referred to therein had been taken. I made a computation from six affidavits submitted by Mr. Bost. I used the total yardage on the six affidavits and the total gold on these six affidavits ran .56 of an ounce per yard. From my knowledge of gravel mines in the state it is a valuable mining claim. I have heard of some gravel claims more valuable than that, but I have never run across them. In recent years I have not heard of many that run that high. In years gone by I read reports and heard rumors of claims that

(Testimony of A. M. Holmes.)

ran much higher than that. By "recent years" I mean the last ten or twenty years; none in the last ten years.

(Thereupon the Government rested.)

Thereupon the following took place:

Mr. Coughlin: At this time, if your Honor please, I desire to move the Court that the Court instruct the jury at this time to return a verdict of not guilty on the ground that the evidence is insufficient to sustain any verdict save and except a verdict of not guilty. [87]

The Court: Denied.

Mr. Coughlin: Exception.

(Exception No. 16.)

The first witness called for the Defense was

A. M. HOLMES,

who testified under oath as follows:

Direct Examination.

(By Mr. Coughlin)

I live half way between Nevada City and Grass Valley. I have lived in Nevada County approximately forty years. I am in the funeral business. I have known Mr. Bost for a great many years, and know other persons who know him in that community. I know his general reputation for truth and veracity in which he lives, and it is good.

(Testimony of A. M. Holmes.)

Cross-Examination.

(By Mr. McWilliams)

I have known Mr. Bost since I was a small boy, about forty years, since I have been there.

Q. Did you know that in the year 1931 he endeavored to get his gold buyer's license, required under the State law, renewed, and that as a result of the protests and the testimony that was given of irregularities in his method of conducting business that his application was denied?

Mr. Coughlin: To which we object on the ground it is not proper cross-examination, and assuming a fact not in evidence.

The Court: Overruled.

Mr. Coughlin: Exception.

(Exception No. 17.)

Mr. McWilliams: Q. Did you ever hear that?

A. No, I am not familiar with that.

I am not familiar with what are called production reports that are required to be given by the producers of natural gold [88] and turned over to the sellers. I never heard that Mr. Gus Sweeney had charged that at the request of Mr. Bost he made out production tickets in blank and that over a period of approximately a year and a half he had turned in or sold gold to Mr. Bost as being of $350 in value and that these production tickets signed in blank by him had been filled in by Mr. Bost to show the production of gold by Bost in the amount

(Testimony of A. M. Holmes.)

of $3600. I did not know that Mr. Gus Sweeney gave sworn testimony to the same effect. I did not know that Mr. Simpkins, of the Empire Star Mining Company filed a protest with Mr. Walter Bradley, State Mineralogist, against the issuance of a gold buyer's license to Mr. Bost as a result of the testimony given at that hearing. I never heard that Mr. Nobs, of the Empire Star Mining Company also at the same time had filed a protest against the issuance of a gold buyer's license to Mr. Bost by reason of the evidence presented during that hearing. I did not know that another protest had been made against the issuance of a buyer's license to Mr. Bost by the consulting engineer of the Empire Star Mining Company. I did not ever hear that Mr. H. N. Maxfield, of the Sixteen-to-One Mine had also filed a similar protest. I never heard that Mr. Bost had been accused of buying stolen gold from the Argonaut Mine in this State.

The next witness called for the Defense was

C. W. CHAPMAN,

who testified under oath as follows:

Direct Examination.

(By Mr. Coughlin)

I am a chemist and am engaged in the practice of that profession at this date. I have been prac-

(Testimony of C. W. Chapman.)

ticing since 1888. I know Mr. Bost, the defendant here. I know other persons who [89] know him. I think I know Mr. Bost's general reputation for truth, honesty and veracity in the community in which he resides. It is good.

Cross-Examination.

(By Mr. McWilliams)

I never heard that in 1932, when he asked to have his gold buyer's license renewed that as a result of protests that were put in and sworn testimony in regard to his method of doing business that that application was denied. I know nothing of that. I never heard when he again attempted two years later to get a gold buyer's license that similar protests were put in and as a result of those protests he withdrew his application. I heard the other questions that were put to the prior witness in regard to the sworn testimony that was given by Mr. Sweeney, as to his having filled in buyer's reports, and to me all of that is strange. I never heard of it until today here. I never heard of his having been charged with having purchased stolen gold from the Argonaut Mine.

The next witness for the Defense was

C. S. ARBOGAST,

who testified under oath as follows:

Direct Examination.

(By Mr. Coughlin.)

I live in Nevada City. I have been living there since 1875. I know Mr. Bost. At the present time I am one of the supervisors of Nevada County. I also have a wood business. I have been a member of the Board of Supervisors five years in January. I know other persons who know Mr. Bost. As to the general reputation of Mr. Bost for truth, honesty and veracity in that community, I would say it was good. [90]

Cross-Examination.

(By Mr. McWilliams)

I never heard as a result of his methods employed in connection with filling in buyer's reports, production reports of gold that his application for a gold buyer's license was denied. I never heard that subsequently, when he renewed that application a couple of years later that as a result of protests that were put in he withdrew his application. I never heard that he had been charged with purchasing gold stolen from the Argonaut Mine.

Redirect Examination.

(By Mr. Coughlin)

As a matter of fact, I do not know whether he was ever charged with purchasing any gold stolen from the Argonaut Mine or any other mine. I have been there sixty-two years.

The next witness called for the Defense was

J. ZANNOCO,

who testified under oath as follows:

Direct Examination.

(By Mr. Coughlin)

I live in Nevada City. I have been living there since 1894. I am in the wood and timber business. I know Mr. Bost and know other people there that know him. I know his general reputation for truth, honesty and veracity. It is very good.

Cross-Examination.

(By Mr. McWilliams)

I heard the questions put to the other witnesses. I never heard of any of those matters that were mentioned.

Redirect Examination.

(By Mr. Coughlin)

I never heard of him being arrested until the time he was [91] arrested in this case.

The next witness called for the Defendant was

BEN A. BOST,

who testified under oath as follows:

Direct Examination.

(By Mr. Coughlin)

I live in Nevada City, California. I have lived there ever since I was born, which will be 72 years

(Testimony of Ben A. Bost.)

tomorrow. Since 1907 until March, 1934, when my health failed me, I was running a general assay office in Nevada City. My work consisted of assaying for gold, silver, lead and copper, and to make amalgamation tests of quartz to see what it would go for sump. I had a nervous breakdown in March, 1934. I have been in Nevada City all of my life except eight months in 1886, when I was in business in Trinity County, in Deadwood. I remained there about eight months. I started in the chlorination business there, and then I went out prospecting with a man named Mr. Swissler. That is the same Mr. Swissler that has been referred to during the course of this trial. I ceased the general assay business in the year 1934. The building where I conducted that business belonged to me at that time, and all of the implements and tools. I do not still own them. During the years 1935 and 1936 I could go in and about that place at any time, I had access, I had the building practically, but still I did not own it, my daughter owned it, and still owns it, the building and equipment. The equipment is still there now. At the time Mr. Rich and Mr. Bongard asked permission to go into my premises, that was after my arrest. I did not make any objection, whatever, to their doing so. As to the grinder that Mr. Rich has referred to, all assays, to make amalgamation tests, have a grinding pan; first you crush the rock in a small rock crusher, as they have in an assay office, and then [92] you put in a grinding

(Testimony of Ben A. Bost.)

pan about 40 pounds, and put in quicksilver, and that makes the amalgamation test, and when you clean that up that is how you get the value per ton for a ton of ore or a ton of quartz. Mr. Swissler came to my office there in the spring of 1928 and said he was prospecting, and that he would like me to put up $250 to help him go ahead, that he thought he would strike pay gravel; that he was in the gravel district. I advanced him the $250. After that he came over occasionally with small amounts of gold. With reference to the Lucky Gravel mine that Mr. Swissler discussed with me, I asked Mr. Swissler, I said, "What is the name of the mine?" And he said, "I have not got any name for it," and then I said, "We will call it the Lucky Gravel," and he said "All right." I asked him where it was located, and he said Cougar Canon, in Eldorado County. That was at the time that he first came to my office in 1928. I saw Mr. Swissler after that time on several occasions. I gave him a few dollars when he came over, until the latter part of October, 1930, Mr. Swissler came over there and wanted to get some more money, so I said, "I don't like to put any more money in unless I see the mine." "Well," he said, "I will take you over." I said, "I do not like to go there," as my wife was ill in San Francisco with a paralytic stroke and I would be liable to be called any minute. He said, "Come on, now, we will go over." That was Mr. Swissler. It was not Mr. Hensen I went over with. I had never

(Testimony of Ben A. Bost.)

seen Mr. Hensen yet at that time. So he had an old truck there, and he said he borrowed it from a friend of his at Rattlesnake Bar, below Auburn. I said, "How are you going over there?" He said, "I have a couple of gentle riding horses," or riding ponies, "and we will go over that way, and we will save time and go on a trail"; so I thought a while, and at last I said, "All right, I will go," so we got down there [93] to Rattlesnake Bridge and these gentle riding horses were burros, so I felt like backing out then, but I thought I would see it through, anyhow, so we started out there. We started from there at half past six in the evening and got to his mine at 3:30 in the morning; I remained over night and during the next day I went in the tunnel; he had some gravel there, and I prospected it and stayed there that day, and the following morning at half past five he took me up the other way to catch the road where it forked to Georgetown; he said he thought he could get a car up there, somewhere around there, and it would take me to Auburn. So, going on the road, old abandoned road, there, along came a camper who was coming down from the mountain, and he asked us where we were going, and Mr. Swissler said I wanted to go to Nevada City; he said, "I have to go through Auburn, I live in Lincoln, I will take you as far as Auburn," and I said, "All right," and so I went to Auburn and went home. That was in October, 1930. That is when I first met Mr. Hensen,

(Testimony of Ben A. Bost.)

who was at the mine when I arrived there. There was no one else there besides Mr. Hensen and Mr. Swissler and myself. I did not ever go back to the mine. The last time that Mr. Hensen was in Nevada City with the returns from the mine he said that the gravel had all been worked out, the pay gravel, and they would have to have some more money to prospect, and told him I did not feel like doing it, I would like to go over and see the mine, but I was too weak then to do it; he said, "Never mind, when I come over again if you are able I will take you over," and I have not seen him since. I have not seen him or Swissler since. That was September, 1935. That was the last time I received any gold from them. When I was getting gold the gold would be brought to me by Mr. Hensen. Mr. Swissler did not bring any gold over from the mine after this lease was made, he wasn't in the office after that. [94] I think Hensen brought gold six times. I think it was September 12 or 13 was the last time I saw him. At that time I told him I would like to see the place again. When I went out there with Swissler I went in the night time. I did not make any marks or anything so I could find my way back in. I had a guide. I am sure the claim had not been recorded, because I named the claim, himself, and he claimed he owned the ground. As it was Swissler's I did not think it was necessary to record it. I designated myself on the form that was sent to the Mint by me as the owner because I was the

(Testimony of Ben A. Bost.)

owner, I bought the claim. I bought a half interest when I advanced the $250 in 1928, and the rest of it when I paid the other money—when I was over there investigating the claim in October, 1930. I gave him $245 then. He asked for $250. I did not give him $250, because I wanted $5 to go on; when I went I had $250 with me.

Cross Examination

(By Mr. McWilliams)

I had known this Mr. Swissler before he showed up in October, 1930, since 1886. I had not seen him from 1886 until he showed up in 1928 the first time. When he showed up the first time he said he had a piece of mining property over there and he was prospecting it, and he needed some money, and asked me if I would advance him $250 for a half interest in it. I was kind of easy in those days on those things, so I said, "Sure, I would." I had a whole lot more money in those days that I have got now. I have no idea what my income was during the year 1928. I don't think I ever had to make any report those days. I did not make any report in those days. My income was such as to permit me to advance Mr. Swissler the $250 in a mine that I had never seen. My income at that time was $8 and $9 a day for assaying. At that time Mr. Swissler said it was an old abandoned mine and the tunnel there, was 900 feet in, that it had been worked in early [95] days, and he was going in there, and he thought

(Testimony of Ben A. Bost.)

he would be able to strike some pay gravel in there; he had gravel then. He said he owned the property. He did not say how he had acquired title to the property. I never asked the question and he never said. I did not ask him whether he had bought the property or not. I don't know whether he had been one of the original owners. He was a friend of mine in Trinity when we were boys, and I trusted him. I had known him in Trinity County eight months. He was prospecting around in Trinity County, prospecting quartz and gravel; during the intervening years he was always prospecting. That is all I knew about him. When I say he came in the spring of 1928 and I turned over the $250 to him, it was cash. I took a receipt for it. I destroyed the receipt years ago, I guess. It naturally got destroyed some way, because I was looking for it when this case came up. Swissler came over occasionally, however, with bits of gold. He did not say whether or not anyone else was interested in the mine at the time he first showed up. He was alone. I could not say when that was he came over with those small lots of gold, it is too far back. I have been interested in quite a few mining ventures in Nevada County before. I was not interested in any mine in Placer County at all, or in Eldorado County, except the Lucky Gravel. My first interest in that was commencing in 1928. I couldn't say how much were these lots of gold that Swissler brought in after 1928. I think one time something in the neighborhood of

(Testimony of Ben A. Bost.)

40 ounces, if I am not mistaken; outside of that, the small amounts, I don't recollect anything about that at all. I consider a small amount an ounce or two. It was I who suggested the name of the mine. I asked him about the name of the mine and he said it was never named, and I called it the Lucky Gravel. It had gone in 900 feet with no name, in the early days, that is, no name that he [96] knew of. I know I gave him some money later on, but how much I cannot recall. I made this trip to the mine in the latter part of October, 1930. The reason I went over to the mine was he wanted some more money in order to send it to his sister, who was sick in Pittsburgh, Pennsylvania. I don't know his sister's name. His home at the time was over at the mine in Eldorado County. I don't know whether anybody else was working in the mine at that time besides him. I did not ask him. I did not ask him how much of a force he had in the mine at that time. I don't think at that time there was anybody but himself. He said he was working in the mine, he did not say he had anybody with him. I never asked him. When he came over in 1930 he wanted $250. I have no recollection of how many shipments of gold had been turned in by him up to that time between 1928 and 1930. I never kept any record of those things. As to the amounts of gold sent over between 1928 and 1930, I got 10 per cent. and he kept 20 per cent. That was pursuant to a verbal arrangement. I don't know how much the

(Testimony of Ben A. Bost.)

mine produced between 1928 and 1930. I know I did not get my $250 back in that period. I have no recollection on that, at all. I kept no record for the purpose of determining when my $250 was repaid. I have no record at all as to whether it was half paid or what percentage was paid up to October, 1930. In regard to this additional money in 1930, I said that before I concluded to put any more money in I would like to see the mine. He said, "I will take you over." I said, "In that thing you have there?" That is, an old Ford car." He said, "I can't take you in this but I can take you to Rattlesnake there." He said, "I borrowed this from a friend of mine, there, and I have to change to riding ponies there, and I will take you over on this." I said, "On condition you get me back, because my wife is dangerously ill in San Francisco with a paralytic stroke, and I am likely to [97] be called in any minute." My wife at that time was at the home of my daughter on Lombard street in San Francisco. I have forgotten the number. The name of my daughter was Mrs. Walmsley. Her first name was Antoinette. Her husband's name is F. S. Walmsley. The trouble with the machine was it did not run very good. According to what he told me during those months the mine was in Cougar Canon, Eldorado County. He did not say where in Eldorado County. I did not ask him. I did not ask him where Cougar Canon was, and I did not know where it was. I was interested in it in a way. I believe I

(Testimony of Ben A. Bost.)

know there is a tremendous difference in the different portions of the mining counties of the State with reference to the output of gold, but I never asked him in what portion of the county it was located. I acquired my first active interest in the mine in 1928. As to evidence of ownership, I had simply a bill of sale, a receipt. I believe it must have been destroyed, I can't find it. Anyway, I bought a half interest at that time in the mine. He was to work it and I had ten per cent. I had a half interest and I was only to get 10 per cent. He was to pay the expenses incident to operation. That was understood. In making the trips from the mine down with these lots of gold he turned in I guess he came down on his burros. I don't know. I never asked him how he came down and had no idea. I started at half past six in the evening right below Rattlesnake Bridge, and went up the American River, east, I guess it is. The river is east and west. I guess we went east. We followed the American River up, the Middle Fork, to opposite Kennedy Hill. I don't know how far that was from where we started; it must have been somewheres between 30 and 40 miles. Burros don't travel very fast, probably about four miles an hour. After we got to Kennedy Hill we turned to the right and proceeded probably five or six miles, something like that. We [98] were following a trail and after turning off those four or five miles we came to the mine, in the neighborhood of four or five miles off

(Testimony of Ben A. Bost.)

the American River. I saw no road to this mine. Swissler said there was no road there. We got there at half past three in the morning, I had something to eat and went to sleep, and after I got up I went through the tunnel. It was in about close to a thousand feet. I went in to the end. I would say a thousand feet is about right. There was evidence of recent work. He had done a hundred and some odd feet of new work. At the time I came to this tunnel at that time this man Hensen was there. I had a casual conversation with him, such as "Hello." Hensen did not have any interest in the property so far as I was aware of at that time. He was employed as a day laborer. I don't know how much he was paid; that is between him and Swissler. I had nothing to do with it. I was not interested in it. I judge the size of the tunnel was something like 5 or 7 feet, the average size tunnel; it is about the average size tunnel they run on gravel properties. I got up about seven or eight o'clock in the morning, I guess, had breakfast, and examined the tunnel. It took me about two hours to examine it. I panned some of the gravel there. I tried three or four of them there and then of the whole part of the gravel, and I took one from the bottom. I don't think it was over three pans I took. To make a test of the pan, to make a good job so that you don't lose anything, it takes all of a half hour to make a test. I simply put the gravel into the pan with some water and washed out the pan until you have

(Testimony of Ben A. Bost.)

the residue of gold. It takes a half hour if you want to be careful not to lose anything. At the termination of that panning I took a rest, I was tired. I rested all that afternoon and that night until about four o'clock the next morning, and then got up and had breakfast and he took me up toward Georgetown, to [99] catch the road. I left the mine at half past five and got to Auburn at half past one. The mouth of the tunnel was timbered. The rest was going through lava. It was not necessary to timber. It goes through lava before you strike the gravel. It went about 800 feet before striking the gravel. At the time I was there there was about a hundred feet of gravel. There was a tent at the mine, and a small creek. That is what they call Cougar Canon. This was Cougar Canon the water was in, a creek—a canon or gulch, whatever you might call it, I don't know. It was about a two-inch stream. It is very valuable up in that country, but it had no name that I know of. I did not make any inquiry relative to water rights, no investigation. I knew nothing about whether those water rights were all taken up. The next time I saw Swissler was the day the lease was signed, in January, 1932, I think; something like that. Prior to the time the lease was signed, and after October, 1930, I did not see Swissler at all. Between October, 1930 and January, 1932 he actually came in with small amounts of gold. Between 1928 and 1930 he came in also. Swissler came in with them before the

(Testimony of Ben A. Bost.)

lease was signed. Between October, 1930 and January of 1932 he came in sometimes two or three months or more; it averaged probably four or five times a year. I could not say how much gold he would bring in on those trips. Although I was getting 10 per cent. I have no idea how much gold as to amount he would bring in. As I said before, one trip I think he brought in some 40 ounces odd. That is the only one that I recollect. I don't know when that was, I could not say. I think it was after I visited the mine in October, 1930; I couldn't say how long after. I did not keep any record of these transactions. I kept records of all of their assaying but I never took any record of this. I have no idea as to how much was brought in other than the 40- [100] ounce item by Swissler after October, 1930. I had to keep records of my assaying transactions because sometimes people that you are assaying for would want a duplicate copy. He brought in from 2 ounces to 40 ounces over a period of several years and I kept no record, whatever. At that time I think I shipped this gold he brought in to Selby's. I am pretty sure I did, through the Nevada County Bank. In those days they shipped for me, excepting toward the last. Then I shipped myself. By "the last" I mean from 1932 on, I shipped, myself. I shipped, myself, too, when I had the gold buyer's license. I think that was in 1929 or 1930. When I made the trip up to the mine in October, 1930 I had an anticipation that I was

(Testimony of Ben A. Bost.)

going to invest more money in it. I had a talk with Swissler in regard to how much he wanted for the balance; he wanted $250. He told me that before I started, in the assay office, there. I couldn't say as to the approximate amount of gold that had been produced by the mine and turned over to me between the spring of 1928 and October, 1930. I could not say as to that time. I think 1928 and 1929 I had a gold buyer's license and it was shipped in that way. I am not certain that is the year. I don't recollect how much gold Swissler had brought in or sent in during that period of over two years. It was in the hundreds. As to the lease that was signed in January, 1932, Mr. Swissler, and Mr. Hensen, and Mr. Larsen came to my place and said they wanted to take a lease on it, that they wanted to put more men to work there, and they wanted the lease so that they could give the other people a sublease. I do not recollect that there was any gold brought in with them at that time. I am not sure whether there was any brought in that time or not. If it was a large amount they brought in I would recall it, anything over 20 ounces. Gold at that time was $20.67 an ounce, and in 1934 it went up to $35 an ounce. When I sent gold to the Mint I was paid on those [101] rates. There was not over 20 ounces at the most, if there was that much brought in, unless that is the date the 40-odd ounces was brought in. I think the 40 odd ounces was the largest shipment I ever received. 20 or 30 ounces of gold would not

(Testimony of Ben A. Bost.)

amount to much to me. It would be $3 or $4; that is all I would get off the 10 per cent. The other parties had an interest in it. If any shipment was brought in at the time the lease was entered into it wasn't a shipment in excess of around 20 ounces. I wouldn't say I would remember distinctly if there were any shipments in excess of that. I have no recollection. I don't remember a shipment that realized over $1000 at that time. There was not any conversation with regard to the terms outside of what was set forth in the lease. I was to get 10 per cent. of all gross receipts from my investment, which amounted to in the neighborhood of $500, probably more. It was probably some more than that but that is approximately. When I went up on the visit to the mine Swissler had fixed his price at $250, and I brought $250 with me. I did not bring enough to pay my expenses coming back, if there were any, because he agreed to bring me back. I don't know why he did not bring me back. He started out to bring me back but only went part ways. He did not give any reason for abandoning me there on the way home. He would have seen me home if I hadn't ran across the party coming down. There was no reason to give any reason for not coming back with me. Mr. Hensen was at the mine. They had a tent over at the mine. Apart from his tent at the mine I don't know where his home was. I saw Hensen after that when he brought the shipments in. I think there were six shipments alto-

(Testimony of Ben A. Bost.)

gether. I don't recollect how many shipments Swissler brought in before or after the lease was signed. I have no recollection of whether it was a substantial amount, or not. I don't even remember that [102] January, 1932 shipment. Hensen brought in six shipments after that. The approximate size of all of the Hensen shipments was somewhere from 80 some odd to 120 something. I don't know the exact figures. The first shipment by Hensen was sometime in January, 1934. Hensen did not bring any gold in 1932. I am referring to those shipments on those affidavits. Swissler brought in the gold after the lease was signed; I don't know how many shipments. I haven't any recollection at all. I don't remember. I have no recollection as to the approximate number that he brought in; I have no approximate recollections as to the size of the shipments that he brought in. I was interested in getting my 10 per cent. I don't know what my 10 per cent. amounted to on those shipments. I made no record, no entry of any kind. He did not accompany the shipments by any statement showing the output of the mine, nothing of that kind; Hensen did not do so at any time. I never asked for anything of that kind. I haven't seen Hensen since the last shipment that he brought in. I inquired in regard to him around Nevada City if they knew a fellow coming in there named Hensen, and nobody knew him. I hadn't seen Swissler since his last shipment. I don't remember the last time I saw him. It must have

(Testimony of Ben A. Bost.)

been the date of the last shipment that he brought in. I have not seen Larsen anywhere after the lease was signed. I did not have any correspondence with any of those three men who signed the lease. I never wrote to any of them or received any letter from them. Those three were signing up for a group of seven—they were going to sublease to the other parties. I don't know who the parties to whom they were going to sub-lease were. I had no interest in the type of the sub-lessors of my property. I had a 10 per cent. interest, but I had no reason to be interested in whom they subleased to, nor whether they were capable miners or fin- [103] ancially responsible. It was certainly of interest to me if they embezzled all of the proceeds of the mine. I took it for granted those lessors were honest men. The lessors who signed up with me were going to sublet to those others; they would be responsible for the output. I did not have anything in writing to that effect. At the time I entered into the original lease they said they were going to have more men there and they were going to pay wages or leases. They said they were going to sublet, but I knew nothing in regard to the financial standing or character or integrity of those proposed sub-lessors. As far as I know I own that mining claim still. I did not ever locate it. When I say I own it, I mean I bought it from Swissler. I paid $500 or $495 for it. Swissler said he owned the ground the claim was on. I never looked up the records to see whether

(Testimony of Ben A. Bost.)

he did or not. I never made any inquiry by writing to the County Recorder or the County Assessor to see whether Swissler appeared on the records as owning the property, nothing of that kind. I had not seen him since the year 1886 and then I knew him for eight months. I wrote this lease, Exhibit 4, myself. I wrote it on the typewriter. When Hansen brought in half a dozen shipments to Nevada City, and when he would bring in those shipments he would stay several days, but not over that. I did not see him during those visits of a couple of days at all, because I was sick. March 4, 1934, I think it was that I had a nervous breakdown. Hensen was bringing in the shipments in 1934 and 1935. Swissler brought them in all the time from 1928 to 1934, I think, about six years. When he came in he would go right back; he would stop sometimes in Grass Valley, in a hotel, I suppose, or a boarding house. I do not know where he stayed. I did not during the period of six years when this business associate of mine was coming in [104] every now and then ever learn where he was stopping. He stopped with some friend in Grass Valley, but I do not know who he was. I was not unable to see him in 1934 and 1935, but to get around with him. I saw him at my home. He called at my house. I did not carry on my business during 1934 and 1935 except making those shipments from the Lucky Gravel mine. I closed my assaying business in 1934, at the time of my nervous breakdown and did not resume

(Testimony of Ben A. Bost.)

it thereafter. The only business I had from 1934 was making the Lucky Gravel shipments; as to the form, some call it retort and others call it sponge. The Mint calls it amalgam kings. It was gold, it wasn't concentrates. I got no concentrates at any time. I shipped the gold that I got in that form during that period of time to the Mint. As late as February, 1936 I think I sent 181 sacks of concentrates to the American Smelting & Refining Company of San Francisco. I shipped some, but do not know how much. I had accumulated the sacks in the assaying office. If anybody wanted to work any quartz or anything I would merely give them the key. When I said I was not transacting business, myself, I mean I wasn't in the office. It was this place the concentrates were usually sent in. I would turn over the key to anybody that wanted access to my plant, letting them put shipments in there. I don't know where those shipments were coming from. I did not keep any record of it. I do not think the law required me to keep a record of the source of concentrates that were received by me at that time, because if it did I never heard of it. I was not buying the concentrates that were being brought in; those concentrates were left there for paying for the work of the office, work they were doing. They were reducing this rock in the office they had, lots of people, prospectors around. I did not keep any record of who they are. They simply asked for the key and to use the plant. I gave the

(Testimony of Ben A. Bost.)

key to anybody who came along. The concentrates [105] that were turned in were mine. I did not keep any record of where they came from, because I did not think it was necessary. To my knowledge, I did not consider that the law required you to keep such a record. I am not familiar with the mining law. My last mining license authorizing me to buy gold expired December 31, 1931. I have not had a license after that. I shipped the concentrates after they came in by freight. I handled those transactions. They went out of the plant to the Selby Plant by truck. I did not load them, myself. The ones that hauled them loaded them. I have got home a record from the Selby Company of those concentrates that were sent down. I haven't it here. I think the whole shipment was 281 sacks, if I am correct.

Q. I have a letter here which I think may refresh your recollection on that subject. In fact, two letters.

Mr. Coughlin: May I see it, Mr. McWilliams?

Mr. McWilliams: Certainly. (Handing paper to Mr. Coughlin).

Q. I will show you these two letters, dated February 7, 1936, and ask you if that refreshes your recollection as to the shipment that you have been referring to.

Mr. Coughlin: We object to this, your Honor, on the ground it is not proper cross examination. There

(Testimony of Ben A. Bost.)

was no examination whatsoever on his direct along this line, an examiantion relative to his concentrates.

The Court: Objection overuled.

The Witness: A. That is correct. 281 sacks shipped, two or three days——

Mr. McWilliams: (Interrupting) Q. 155 plus 145 makes 288?

A. 281, isn't it? Maybe it's 88.

Q. As I figure it, that is 300, is it not? Does that refresh your recollection? Take another look. If that was the amount.

A. I guess that is right as far as the shipment comes, but they [106] only received 281 sacks.

Q. It does now refresh your recollection?

A. They were sent out from my home.

Q. You mean your place of business?

A. Yes.

Q. And they were concentrates that had accumulated in your office, and you now recall, having refreshed your recollection, that they had accumulated over what period of time, would you say?

A. Oh, I think it was a year and a half or more.

Q. February, 1936?

A. Something like that.

Q. Back from the middle of February, 1934, is that right?

A. I guess so.

Q. And you recall now that your memory is refreshed, that had actually accumulated over that period of time?

(Testimony of Ben A. Bost.)

A. That is what I shipped—but didn't arrive; that is what accumulated.

Q. You recall that now clearly, do you?

A. Yes.

Q. Is it not a fact that in addition to this 300, that you had shipped almost twice that many?

A. When?

Q. During that period of time. Between the time of your breakdown and 1936.

A. Not that I know of.

Q. Not that you know of?

A. No.

Q. You recall it was only this 300?

A. That is all.

Q. I also show you another letter. See if that refreshes your recollection on that subject.

Mr. Coughlin: That is objected to as incompetent, irrelevant and immaterial, and as having no bearing on the issues of the case, and not proper cross examination.

The Witness: This refers to that shipment.

Mr. McWilliams: Q. It does?

A. Yes.

Q. Are you sure about that?

A. Certainly.

Mr. McWilliams: I offer the three letters in evidence, your Honor, and ask they be marked as one exhibit. [107]

Mr. Coughlin: I object as incompetent, irrelevant, and immaterial, and not tending to prove any

(Testimony of Ben A. Bost.)

of the issues in this case, and not proper cross examination.

The Court: Overruled.

(The letters were marked "U. S. Exhibit 6.")

Mr. McWilliams: I would like to read these letters into the record.

(Mr. McWiliams reads Government's Exhibit 6.)

I was visited, as I recall it, by Mr. Hensen on the 12th or 13th of September, 1935. He wanted more money to carry on. The production during the year 1934 I think was somewhere in the neighborhood of $9000. In 1933 it was little or nothing. I do not know what it was during 1932, I can't say, I have no recollection, at all. I got 10 per cent. throughout the year 1932. I can say what I got was under $400. I could not say what it was. It was a small amount, that is sure. I don't remember what it was in 1935, but I know it is in the neighborhood of $9000. I haven't the least idea of the total amount of gold taken out of that gravel mine. I know that in 1935 $9000 was taken out of the mine on the shipment to the Mint reports. I have no record, whatsoever, of it. You remember, I have been pretty sick. When Mr. Hansen came in and told me that the gravel mine had worked out the last prior shipment that I had received prior to that information from him, I don't know whether it was April, May or June. One of those months, I could not say. I don't remember the amount. It was in the neighborhood of $3000. Mr. Hansen said, in regard to

(Testimony of Ben A. Bost.)

the mine being worked out when it showed $3000 in September, that was the last clean-up. There wasn't any more pay gravel. As to why they wanted more money, I having given them $9000, they claimed that the gravel was taken out above the water level and they would [108] have to run another tunnel, so I asked them to take me over there and I would look the mine over as soon as I was able, and he said he would be back again and take me over, and I have never seen him since. At the time I was over there the mine was all right. I knew the general character and type of mine inside. I had this experience with my associates running there over a period of four years, and had found them presumably competent, and trustworthy and reliable, I thought they were. When they said more money was necessary I will tell you the reason why I did not take their word for it. I was in bad health, and getting old, and I thought if they wanted any more money, I did not have the money, myself, I would have to go out amongst my friends and raise it, that I would like to see what was over there first. I have been in the mining game all of my life, and the other men were also, as far as I was aware, and they had been operating the mine, themselves, and had first-hand knowledge of the conditions. That took $1500. They didn't know how long the tunnel would be. They thought it would have to be longer than the old tunnel, to get down lower in the gulch. They were going to build an entirely new tunnel, they were telling me. The tunnel went through lava about 800 or 900

(Testimony of Ben A. Bost.)

feet, and you drive it through lava by blasting the ground with drills and powder. They didn't drive the old tunnel. As to how long it would take a practical mining man to drive that, it depends on how many men there were in there. I could not tell how many men worked on that tunnel. There couldn't be more than three work on a shift. They could work three shifts. I didn't stop to figure how long it took to drive that tunnel, having a full crew of competent men. It would take several years, I should judge. The men could live in tents. They had a tent there. I did not see any evidence of an attempt to de- [109] velop a mine—whether sheds, or shanties, or how it was. I did not see any at all. They put new timber in the mouth of the tunnel. I do not know how far that gravel extended in the tunnel. The tunnel is supposed to run through that ridge. I don't know how deep it was, or the width. Once in a while they had to timber that part where they struck the river bed. I do not know whether they could drive the tunnel along there instead of starting a new tunnel. It would have been practical. I do not think you could drive a tunnel through 800 feet of lava rock for $1500. They did not say whether that would be sufficient for the purpose. That is what they wanted put up. As to how that $1500 was to be expended, they wanted me to pay them wages, part of that was for supplies and wages and tools and everything necessary to mine with. They wanted me to pay the full $1500 and said that it would finance this additional work.

(Testimony of Ben A. Bost.)

They didn't give any reason for suggesting that I put up the full $1500. I called their attention to the fact that during that year they had undoubtedly received 90 per cent. of over $9000, and they said they earned it; they didn't make more than wages for seven men. I never mentioned anything with regard to the fact that in the prior year they had made almost $9000. I knew at that time how much the prior year's profits were. That wasn't discussed at all. I called their attention to the fact that the lease was to run five years, and that it wasn't up at that time. They said that didn't make any difference about the lease. If they had to run a new tunnel over there they wanted to be paid for it. I did not succeed in locating Swissler any place, I never knew where he was at all. I thought he was dead. I never saw Larsen before and have never seen him since. I had his signature and knew his name. I couldn't locate him any place. I never saw Hensen since. He promised to come back and take me to the mine. He said he would [110] be back soon. I told him that he did need to come back in a hurry because I did not think I would be able to get around. I don't think he is coming back now. When Swissler and Hensen came in with these lots of gold from time to time they gave me the gold and said, "This is so many ounces," and I figured it out. That is all they did. They did not give me a written statement. They told me the mine was looking good. When they made these

(Testimony of Ben A. Bost.)

periodic trips we discussed that they were working and it looks pretty good, just general statements. I did not keep any record of those statements.

Redirect Examination

(By Mr. Coughlin)

The last time Hensen was in I said I would like to go over and see that mine. At no time after that did I see Hensen, Swissler or Larsen. At the time I was receiving this gold and at the time I was shipping it to the United States Mint, I believed, as the affidavit says and sworn to, the best of my knowledge and belief, I thought it came from the Lucky Gravel mine. I remember talking to Mr. Lynn in Nevada City. The first time I talked to him was somewhere around August of last year. I had seen Hensen the last time in September the year before. After I talked to Mr. Lynn I gave him, at the time I talked to him, a description to the best of my ability as to how to get there. Mr. Lynn came back again. He told me that he or the United States Government had made an investigation and could find no such mine. I did not at any time prior to the time that I realized that Hensen and Swissler and Larsen had not returned, and prior to the time that Mr. Lynn told me that there was not such mine being operated by those people over there, suspect Larsen or Swissler or Hensen during the time Hensen was bringing the gold to me. At the present time, after Mr. Lynn gave me [111] all of that report, he had been all through that country, I had kind of an idea in my mind

(Testimony of Ben A. Bost.)

that those fellows fooled me over there, or that they took me to somebody else's mine and showed me that, or whether they actually did own that property. I surely believed at the time I received gold from them it was coming from that mine or I would not have made that affidavit to the Mint. I told Hensen in 1934 to put up a sign there "The Lucky Gravel Mine," and he promised he would. Whether he put it up or not, I do not know. I have some doubts at the present time as to whether I actually own the mine or not. I believed at the time I did.

Recross Examination

(By Mr. McWilliams)

As to when these suspicions of my business associates first engendered in my mind, after the last time Mr. Lynn was telling me that he and—I think he said Mr. Rich was with him over there, and they went all through it and could not find anything on it, maybe there is something wrong. I don't think just at the time I told him in conversation with him that his statement made me somewhat suspicious in regard to my associations. I began to think so about a week afterwards when I commenced thinking things over. I got suspicious in October, 1936. Up to that time I was not at all suspicious in regard to them or any of them. It did not make me suspicious of him when he had promised to come back and take me to the mine and never showed up, as I did not know when he was coming. He said the next time he came over. It was in September, 1935 I had this talk with Hensen that he would

(Testimony of Ben A. Bost.)

come back and take me. When a year expired and he did not show up I thought they left the country. I was not suspicious. I thought that they had merely quit over there. I did not make any investigation then to find out about these men; I did not know where to look for them. I [112] did not write to the Recorder's Office to find out whether there were any records there. I did not write to the Assessor's Office to find out what he knew about them. I went from Nevada City to Rattlesnake Bridge in an automobile. Swissler took me down. After he got there he gave the automobile to the man who owned it; his name was Horner. That was the dilapidated car I was telling you about. Coming back when we left the mine we started out with jacks or burros. I do not know how far we traveled with them. It must have been five or six miles above Georgetown. I was traveling about an hour and a half with the burros. I was not traveling on the same trail I came in. After I had covered this distance with the burros this camper came down there from up—I think he come from Josephine, or if there is a name like that—up there. I did not make any memorandum of the circumstances of this trip when they were fresh in my memory, no record at all. The amount of gold brought to me from the Lucky Gravel Mine, the amount in these Government affidavits, I think is in the neighborhood of $18,000. There was some gold brought to me from that mine before that actually went into effect. I could not recollect the value of that. I do not

(Testimony of Ben A. Bost.)

think it was as much as $9000. I don't know. Only Hensen and Swissler brought me the gold from the mine. When Swissler called upon me with some ounces of gold I would weigh it and figure up, figure his 90 per cent. I took the gold and weighed it and figured up what the gold was worth and what my percentage would be, and what was coming to him and paid him then and there, or next day in cash. I had part of the money in my place and the rest I borrowed from relatives of mine who lived there part of the time. I paid them in cash for the entire amount every time. In all of these transactions involving some $18,000 I kept no record of my own, kept the Mint returns. I had those. [113]

Thereupon the Defense rested.

Thereupon the Government proceeded with its Rebuttal evidence. The first witness recalled by the Government in rebuttal was

R. C. LYNN,

who testified as follows:

Mr. Bost said he caught a ride from Nevada City to Rattlesnake Bridge with a man who was driving on to Sacramento. I do not recall that he stated his name. I believe he stated he was a traveling salesman. He said he went from there down to the mine on the jacks of Mr. Hensen.

Cross Examination

(By Mr. Coughlin)

I believe he did mention the name of the man he went with to Rattlesnake Bridge. I am testifying

(Testimony of R. C. Lynn.)
as to my recollection in that regard of a conversation that took place in September over a year ago.

Redirect Examination

(By Mr. McWilliams)

I refreshed my recollection before I went on the stand from notes that I made immediately after my conversation with Mr. Bost. Those are the same notes I turned over to counsel to examine.

Thereupon both sides rested.

Mr. Coughlin: I desire, for the purpose of the record, at this time to move the Court to instruct the jury to return a verdict of not guilty on the ground that there is no evidence—that there is not sufficient evidence—to sustain any other verdict save and except a verdict of not guilty. [114]

The Court: I will rule on Mr. Coughlin's motion Friday morning.

(An adjournment was here taken until Friday, November 26, 1937 at ten o'clock a. m. at which time the trial was resumed.)

The Court: The motion to instruct the jury to return a verdict of not guilty is denied.

Mr. Coughlin: Exception.

(Exception No. 18.)

Thereupon the cause was argued by counsel for the Government and by counsel for the defendant, at the conclusion of which the Court instructed the jury as follows:

The Court (Orally): Gentlemen of the Jury, in this case the defendant is charged in five counts for violating Section 80, 18 United States Codes Annotated. The law that he is charged with violating provides that whoever shall knowingly and wilfully falsify, or conceal, or cover up, by any trick, scheme or device, a material fact in any matter within the jurisdiction of any department or agency of the United States, shall be punished in the manner therein provided by law.

The particular matter that the defendant is charged with having concealed and covered up has to do with the alleged purchase by the defendant of certain gold, and the subsequent sale of that gold to the United States Mint at San Francisco.

Under the Gold Reserve Act of 1934, United States Mints are authorized to purchase gold recovered from natural deposits in the United States, which gold has not entered into monetary or industrial use. For the purpose of carrying this Gold Reserve Act into effect the Secretary of the Treasury is authorized to issue appropriate regulations. It is provided in the regulations so issued by the Secretary of the Treasury that in the case of persons who have purchased such gold directly from those who [115] have mined or panned it, the Mint shall not purchase such gold unless it is accompanied by a properly executed affidavit, on a certain specified form, together with a statement, also under oath, giving, among other things, the names of the persons from whom the gold so offered for sale was purchased.

It is alleged in the first count in the indictment in this case that on or about the 6th day of April, 1936, the defendant, Ben A. Bost, requested the San Francisco Mint, which was at the time an agency of the Treasury Department of the United States, to purchase certain gold which was then and there tendered by said defendant to the Mint for sale.

It is further alleged that for the purpose of inducing the Mint to purchase said gold it was accompanied by an affidavit executed by said defendant, under the terms of which defendant is charged with having wilfully, knowingly and unlawfully certified and sworn to certain material matters which were not true, and which he did not believe to be true when he swore to said affidavit, to-wit, that he was the owner of a mining claim called the Lucky Gravel claim, and that the source of said gold so tendered and deposited was Lucky Gravel claim, mostly small nuggets, and that said gold had been recovered from said claim, which claim it was stated in said affidavit was located in Cougar Canon, Eldorado County, California, whereas in truth and in fact, as said defendant then and there well knew, he was not the owner of any mining claim in said county and State known as or called the Lucky Gravel claim, and whereas, in truth and in fact, the source of said gold was not said Lucky Gravel claim, and said gold had not been recovered from said claim, which said facts said defendant is charged at all times to have well known.

In the second, third, fourth and fifth counts of the indict- [116] ment, similar charges are made against the defendant in connection with the sale of gold to the Mint, the principal difference in the subsequent counts being that in those counts different affidavits are alleged to have been presented by the defendant to the United States Mint at San Francisco on different dates from the one mentioned in the first count.

The Gold Reserve Act of 1934 authorized the Secretary of the Treasury to issue regulations for the purpose of carrying that Act into effect. Such regulations have the force and effect of law. Mere ignorance by the defendant of such regulations does not constitute a defense on a charge of the kind involved in this action.

Since the language of the indictment includes the charge that the defendant falsified a material fact, it is not necessary for the Government to prove that it was actually deceived by the actions of the defendant. If you find beyond a reasonable doubt that the defendant did falsify a material fact in a matter within the jurisdiction of the Treasury Department of the Government, you are authorized to find him guilty.

Under the law of the State of California it is unlawful for any person to engage in the business of purchasing or receiving for sale gold nuggets, ores, or concentrates bearing gold, without first procuring a license authorizing him to carry on such business.

Moreover, under the law of the State of California it is further provided that every person carrying on such business shall keep and preserve a book in which shall be entered at the time of the delivery to him of any gold nuggets, gold-bearing ores or concentrates, certain information, including the name or location of the mine or claim from which it shall be stated that such gold had been mined or procured, and the name of the party delivering the same, with the date of delivery. [117]

I further instruct you that although a purchase or sale of property usually implies the payment of a price in money, such payment in money is not essential to a sale. A sale may be for money or its equivalent, and such equivalent may take the form of services, or the supplying of accommodations or equipment.

A material element of the crime charged in the indictment is the element of intention, the state of mind, the question whether there was a fraudulent intention in the mind of the accused. Each and all of the counts charge the making of a false oath or a fraudulent concealment. A false oath must be fraudulently made, the concealment must have been fraudulently made.

While it is sometimes said a man must be presumed to intend the natural consequence of his acts it is never presumed, nor should a jury presume, that a man had a specific criminal intent. When a criminal statute requires the presence of a specific criminal intention, such as a fraudulent intention, such specific intention must be proved, not presumed.

The burden of proving a specific intention rests upon the prosecutor, and from the beginning to the end of a trial that must be proved, like any other fact, beyond a reasonable doubt. This question of intent, however, like all other questions of fact, is solely for the jury to determine from the evidence in the case.

The indictment on file herein is, and is to be considered as a mere charge or accusation against the defendant, and is not of itself any evidence of the defendant's guilt, and no juror in this case should permit himself to be to any extent influenced against the defendant because of or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant is guilty or not guilty of the offense charged, considering all of the evidence submitted to you in the case. It is not for you [118] to consider the penalty prescribed for the punishment of the offense at all. If you are aware of the penalty prescribed by law it is your duty to disregard that knowledge. In other words, your sole duty is to decide whether the defendant is guilty or not guilty of what he is charged with. The question of punishment is left solely to the court, except as the law circumscribes its power.

In civil cases, gentlemen, the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be in accordance with the preponderance of the evidence; but in criminal cases guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the government.

The law does not require of the defendant that he prove himself innocent, but the law requires the government to prove the defendant guilty in the manner and form as charged in the indictment, beyond a reasonable doubt, and unless the government has done so the jury should acquit. Before a verdict of guilty can be rendered each member of the jury must be able to say in answer to his individual conscience, that he has in his mind arrived at a fixed opinion based upon the law and the evidence in the case, and nothing else, that the defendant is guilty.

You are the exclusive judges of the credibility of the witnesses whose testimony has been admitted in evidence herein, and of the effect and value of such evidence. Your power in this regard, however, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. It is the province of the Court, under the law, to state to you the rules of law applicable to the case, and you, in your deliberations, will be guided by those rules as stated. It is your duty to pass upon and decide all questions of fact. [119]

In arriving at a determination as to the credibility of the witnesses who have appeared before you, you will remember that every witness is presumed to speak the truth, but this presumption may be overcome or repelled by the manner in which the witness testifies. This presumption may be overcome by the appearance of the wtiness upon the stand, and by the character of his testimony; or if it is unreasonable or incongruous, or by the giving of false or perjured testimony by him, or by his

interest in the case, or by any bias that may have been displayed, or by any contradictory evidence.

The defendant has offered himself as a witness in the case. This is his right, and you are to weigh his testimony in accordance with the rules given you with respect to the weighing of the testimony of the other witnesses in the case, with this additional feature, which is personal to him, you are to weigh his testimony in the light of the fact that he is the defendant in the case, and in the light of his interest in the outcome of the case because of that fact.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against that presumption or other evidence satisfying your minds.

I further instruct you that the oral admissions of a party have to be viewed with caution. The law presumes a defendant shall be looked upon as innocent until proven guilty beyond a reasonable doubt. This presumption remains with the defendant and will avail to acquit him unless overcome by proof of his guilt beyond a reasonable doubt. If you can reconcile the evidence before you with any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find the defendant not guilty. [120]

The Court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence, and if after an impartial comparison of all the evidence there is a want of sufficient evidence on behalf of the Govern-

ment to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and you should acquit him; but if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt and you should convict him. By such reasonable doubt you are not to understand that all doubt is to be removed. It is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you by the strong probabilities of the case. The probabilities might be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt. As long as you have a reasonable doubt of a defendant's guilt you may not convict him.

The good character of a person accused of a crime, when proven, is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence. It must be considered in connection with all the other facts and circumstances in the case and may be sufficient in itself to raise a reasonable doubt of a defendant's guilt; but if after a full consideration of all the evidence adduced the jury believes the defendant to be guilty of the crime charged they should so find, notwith-

standing proof of good reputation. A man of good reputation may still commit crimes.

When weighing all the evidence you have an abiding convic- [121] tion and believe that the defendant is guilty it is your duty to convict, and no sympathy justifies you in seeking for doubt, or putting any strained or unreasonable construction or interpretation on the evidence or the facts. Your verdict must be unanimous. The Clerk has prepared merely for your convenience two forms of verdict, the first of which is, after the entitlement of court and cause: "We, the jury, find Ben A. Bost, the defendant at the bar, ...," and a place for you to insert your verdict and for the foreman to sign the same; the second of which is, after the entitlement of court and cause: "We, the jury, find as to the defendant at the bar as follows ..... on first count, ... on second count, ... on third count, ... on fourth count, ... on fifth count," and a place for the signature of your foreman. When you have agreed upon a verdict your foreman will sign the same and you will be returned into court. Should you wish to have any or all of the exhibits in the case you may make the request and they will be sent to you in the jury room.

You may state your exceptions, if any. Any exceptions, gentlemen? The jury will retire.

(The jurors thereupon retired from the courtroom to deliberate on a verdict at 1:54 p. m. At 2:54 p. m. of said day the jury returned into court and delivered their verdict as follows:)

(Title of Court and Cause.) No. 25961-S.

"We, the Jury, find as to the defendant at bar as follows: Guilty on first count, Guilty on second count, Guilty on third count, Guilty on fourth count, Guilty on fifth count.

(Signed) C. H. ADAMS,
Foreman."

(Thereafter, and on November 30, 1937, the defendant duly moved the Court for a new trial, said motion being as follows:) [122]

(Title of Court and Cause.) No. 25961-S

"Comes now the defendant Ben A. Bost and moves the above-entitled Court for a new trial in the above-entitled cause, and for grounds specifies:

"1. That on the trial the Judge admitted improper evidence.

"2. That the verdict is contrary to the evidence.

"3. That the verdict is contrary to law.

"4. That the verdict should have been for the defendant.

"5. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

RAY T. COUGHLAN,
ROBERT A. ZARICH,
Attorneys for Defendant.

"Service by copy is hereby admitted this 30th day of November, 1937,

FRANK J. HENNESSY."

Thereafter the Court denied the said motion for new trial, to which ruling an exception was duly taken by the defendant.

(Exception No. 19.)

Thereafter, and on December 3, 1937, the Court imposed judgment and sentence upon defendant, Ben A. Bost, as follows: That defendant Ben A. Bost be imprisoned in a United States Penitentiary to be designated by the Attorney General of the United States for and during the time and period of five years and pay a fine in the sum of $5000 as to the first count of the indictment; be imprisoned for and during the term and period of five years on the second count of the indictment; be imprisoned for and during the term and period of five years on the third count of the indictment; be imprisoned for and during the term and period of five years on the fourth count of the indictment; and be imprisoned for and during the term and period of five years [123] on the fifth count of the indictment. Further ordered that in default of the payment of said fine the said defendant be further imprisoned in the United States Penitentiary until said fine is paid or until he be otherwise discharged in due course of law. Further ordered that said terms of imprisonment imposed on said defendant in this cause run concurrently.

To the rendering of said judgment and sentence the defendant then and there duly excepted.

(Exception No. 20.) [124]

Thereafter, and upon the 18th day of December, 1937, which is within the time provided by the rules of court, the plaintiff, and the defendant, Ben Bost, duly stipulated, by and through their respective counsel, that the time within which the bill of exceptions in said action on behalf of said defendant and appellant, Ben Bost, be settled, be extended to and including the 12th day of February, 1938, and that said defendant and appellant file his assignment of errors and proposed bill of exceptions on or before the 12th day of February, 1938, and finally, that the plaintiff and appellee file its proposed amendments, if any, to said bill of exceptions on or before the 28th day of February, 1938. Whereupon, the Honorable A. F. St. Sure, the Judge of said Court, before whom and a jury said cause was tried, did make and enter an order on said 18th day of December, 1937, wherein and whereby it was ordered that the time within which the bill of exceptions in the above entitled action on behalf of the defendant and appellant, Ben Bost, be settled, be extended to and including the 3rd day of March, 1938, and further, that said defendant and appellant file his assignment of errors and proposed bill of exceptions on or before the 12th day of February, 1938, and finally, that the appellee file his proposed amendments, if any, to said bill of exceptions on or before the 28th day of February, 1938. Said order was

based upon the stipulation last hereinabove referred to, and good cause appearing to the court.

That thereafter, upon the 10th day of February, 1938, the appellant herein, Ben Bost, filed a written motion and a petition in the United States Circuit Court of Appeals for the Ninth District, asking that his time be extended for the lodgement of his bill of exceptions and assignment of errors. That the Circuit Court of Appeals on the 14th day of February, 1938, in open court, upon the hearing of said petition and motion, made and entered its order extending the time for the lodgement of the bill of excep- [125] tions and assignment of errors on behalf of the defendant and appellant to and including the 21st day of February, 1938, and that the appellee file its amendments, if any, on or before the 3rd day of March, 1938, and it was further ordered that the trial court settle said bill of exceptions within five days thereafter, namely, the 8th day of March, 1938.

And thereafter, on the 17th day of February, 1938, an order was duly entered of record, p*usu*ant to the stipulation of the parties hereto, that the original documents and exhibits offered in evidence in said cause, that are not herein re-produced, be considered incorporated and as a part of the bill of exceptions in said cause as though actually a physical part thereof, and that the same be separately certified by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit. Accordingly, the exhibits in evidence herein, which are not set forth in this bill of exceptions, the same being

separately certified by the clerk of this court to the United States Circuit Court of Appeals, in and for the Ninth Circuit, are hereby referred to and incorporated and included herein and made a part hereof, the same as if actually herein set out in full.

Wherefore, said defendant and appellant, Ben Bost, hereby tenders, with said original exhibits, this as his bill of exceptions, which said proposed bill of exceptions is all of the evidence received in said cause, and respectfully prays that the same may be allowed, settled and signed by the Judge of this Court, as provided by law and the rules of court, this said bill of exceptions being tendered to said court this 17th day of February, 1938, which is within the time heretofore granted by the court, and further extended by the Circuit Court of Appeals, pursuant to the rules of court and the statute appertaining thereto for the presenting, signing and filing said bill of exceptions herein.

RAY T. COUGHLAN
JAMES M. HANLEY
Attorneys for defendant and appellant. [126]

Service and receipt of copy of the within proposed Bill of Exceptions this 17th day of February, 1938, is hereby acknowledged.

F. J. HENNESSY
United States Attorney
By ROBERT McWILLIAMS
Attorneys for Plaintiff. [127]

ORDER SETTLING AND ALLOWING ENGROSSED BILL OF EXCEPTIONS

The foregoing Bill of Exceptions, having been duly presented by defendent Ben A. Bost within the time heretofore duly and regularly fixed and allowed by the Court, and enlarged by the Order of the Circuit Court of Appeals, made on the 14th day of February, 1938, in accordance with law, and the plaintiff and appellee having filed no amendments to said proposed Bill of Exceptions, and said proposed Bill of Exceptions is correct and may be settled, allowed and approved as the Bill of Exceptions of said defendant and appellant, Ben A. Bost, and it appearing that said Bill of Exceptions is correct in all respects, and contains all the evidence of said cause, and good cause appearing therefor, said Bill of Exceptions is hereby settled, allowed and authenticated as and for the Bill of Exceptions of said defendant and appellant Ben A. Bost, for use on appeal in said action.

Dated, March 8, 1938.

A. F. ST. SURE
United States District Judge

[Endorsed]: Lodged Feb. 17, 1938. Filed Mar. 8, 1938. [128]

[Title of District Court and Cause.]

NOTICE OF APPEAL BY DEFENDANT BEN BOST

Name and address of appellant: Ben Bost, Nevada City, Calif.

Names and addresses of appellant's attorneys:

James M. Hanley, 210 Post St., San Francisco, California.

Ray T. Coughlin and Robert A. Zarick, 507 Bryte Bldg., Sacramento, California.

Offenses: Section 80 of Title 18 of the United States Code—5 counts.

Date of judgment: December 3, 1937.

Brief description of judgment: Five years in U. S. Penitentiary on five counts, running concurrently, and on first count also a fine of Five Thousand Dollars.

Name of prison where now confined if not on bail: San Francisco County Jail No. 1.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

Dated: December 9, 1937.

BEN BOST
Appellant

Grounds of Appeal

(1) That neither of the five counts of the indictment upon which defendant was convicted and sentenced states facts sufficient to constitute an offense

by Appellant againt the laws of the United States of America.

(2) That neither of the five counts of the Indictment states facts sufficient to constitute an offense by Appellant under Section 80, of Title 18, United States Code, for the following reasons, to wit: [129]

(a) That said counts and each of them fail to allege or show that Appellant filed, or caused to be filed, a false, or any, affidavit or other document with the United States Mint or any other agency or department of the United States of America.

(b) That said counts and each of them fail to allege or show that Appellant in any manner whatsoever cheated or defrauded the United States of America, or any agency or department thereof, or caused the same any pecuniary loss.

(c) That said counts and each of them fail to allege or show that Appellant in any manner concealed or covered up from the United States of America, or any agency or department thereof, any material fact, or any fact, within its jurisdiction.

(d) That the purported regulation promulgated by the Secretary of the Treasury, which are the foundation of and referred to in said five counts of the indictment, were and are null and void because they constitute an attempt by said executive official to exercise legislative power and functions.

(e) That the Gold Reserve Act of 1934 is unconstitutional and void for the reason, among others, that it attempts to make an unlawful delegation of legislative power to the Secretary of the Treasury of the United States of America.

(f) That the facts alleged in said five counts and each of them show, at the most, a violation of the regulations issued under the Gold Reserve Act of 1934, which provides its own penalties, and hence this case is not within the purview of Section 80 of Title 18, U. S. C. A.

(g) That said five counts and each of them were and are fatally uncertain and insufficient in various material respects.

(3) That the Court erred in overruling appellant's [130] demurrer to said indictment and each of the five counts thereof.

(4) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the five counts in said indictment upon which judgment was entered.

(5) That the evidence is insufficient as a matter of law to sustain the verdict and judgment against appellant on any of the counts to which he has been sentenced.

(6) That the court erred in denying Appellant's motion for a directed verdict of not guilty on each of the counts in the indictment upon which he was convicted at the conclusion of the entire evidence.

(7) That the court erred in denying Appellant's motion in arrest of judgment in this case.

(8) That the court erred in denying Appellant's motion for a new trial.

(9) That the court erred in admitting and refusing evidence at the trial of said case, over the objection of Appellant, including the following:

(a) The court admitted, over the objection of Appellant, evidence as to acts and events, and purported offenses, occurring after the period covered by the indictment which evidence was not within the issues raised by the plea of not guilty to the five counts alleged in the indictment, and were wholly beyond and foreign to said issues.

(b) The Court erred in admitting, over the objection of Appellant, evidence concerning and relating to various gold transactions both before and after the period covered by the indictment in this case, and with which Appellant was not at all connected, and which said evidence was not within the issues raised by the plea of not guilty to each and every count in the indictment.

RAY T. COUGHLIN
ROBERT A. ZARICK
JAMES M. HANLEY
Attorneys for Appellant
Ben Bost [131]

(Admission of service)

[Endorsed]: Filed Dec. 9, 1937. [132]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Ben A. Bost, defendant and appellant in above-entitled matter and makes and files

the following assignment of errors herein upon which he will apply for a reversal of judgment and sentence heretofore made in said cause against him, and which errors, and each of them, are to the great detriment, injury and prejudice of said defendant and appellant, and in violation of the rights conferred upon him by law; and said appellant says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the Southern Division of the United States District Court for the Northern District of California, there is manifest error, in this, to wit:

I.

The Court erred in overruling appellant's demurrer to the indictment in this cause and each count thereof for the following reasons, among others, to wit:

1. The facts set forth in the First Count do not state facts sufficient to constitute an offense against the United States.

2. That it does not appear in said Indictment, in the First Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation [133] of the Gold Reserve Act of 1934.

3. That it does not appear in said First Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

4. That it does not appear in said Indictment, in the First Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or officer thereof, or any corporation in which the United States of America is a stockholder.

5. That it does not appear in said Indictment, in the First Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer of the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder.

6. That it does not appear in said Indictment, in the First Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Second Count of said Indictment, defendant specifies as follows:

1. The facts set forth in the Second Count do not state facts sufficient to constitute an offense against the United States.

2. That it does not appear in said Indictment, in the Second Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a [134] violation of the Gold Reserve Act of 1934.

3. That it does not appear in said Second Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

4. That it does not appear in said Indictment, in the Second Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or officer thereof, or any corporation in which the United States of America is a stockholder.

5. That it does not appear in said Indictment, in the Second Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of Ameica is a stockholder.

6. That it does not appear in said Indictment, in the Second Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Third Count of said Indictment, defendant specifies as follows:

1. The facts set forth in the Third Court do not state facts sufficient to constitute an offense against the United States.

2. That it does not appear in said Indictment, in the Third Count thereof, nor can it be ascertained

therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934. [135]

3. That it does not appear in said Third Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

4. That it does not appear in said Indictment, in the Third Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or Officer thereof, or any corporation in which the United States of America is a stockholder.

5. That it does not appear in said Indictment, in the Third Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder.

6. That it does not appear in said Indictment, in the Third Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Fourth Count of said Indictment, defendant specifies as follows:

1. The facts set forth in the Fourth Count do not state facts sufficient to constitute an offense against the United States.

2. That it does not appear in said Indictment, in the Fourth Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934. [136]

3. That it does not appear in said Fourth Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

4. That it does not appear in said Indictment, in the Fourth Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or Officer thereof, or any corporation in which the United States of America is a stockholder.

5. That it does not appear in said Indictment, in the Fourth Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder.

6. That it does not appear in said Indictment, in the Fourth Count thereof, that this defendant

made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

Demurring to the Fifth Count of said Indictment, defendant specifies as follows:

1. The facts set forth in the Fifth Count do not state facts sufficient to constitute an offense against the United States.

2. That it does not appear in said Indictment, in the Fifth Count thereof, nor can it be ascertained therefrom, whether this defendant is charged with a violation of the provisions of Section 80 of Title 18 of the United States Criminal Code, or a violation of the Gold Reserve Act of 1934. [137]

3. That it does not appear in said Fifth Count of the Indictment, nor can it be ascertained therefrom how or in what manner this defendant attempted to or did defraud the Government of the United States or any Department thereof.

4. That it does not appear in said Indictment, in the Fifth Count thereof, that this defendant presented any claim upon or against the Government of the United States, or any Department or Officer thereof, or any corporation in which the United States of America is a stockholder.

5. That it does not appear in said Indictment, in the Fifth Count thereof, that this defendant made or caused to be made or presented or caused to be presented any claim for payment or approval to or by any person or officer in the civil, military or

naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder.

6. That it does not appear in said Indictment, in the Fifth Count thereof, that this defendant made, caused to be made or presented or caused to be presented a claim to any person or officer of the Government of the United States having authority to allow and approve such claim.

II.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Mr. McWilliams: I desire to offer the map in evidence and ask to have it marked as Government's Exhibit.

"Mr. Coughlin: Might I inquire the purpose?

"Mr. McWilliams: Yes, it is for the purpose of showing that neither on this map nor any other official map is there any Cougar Canon, although there are many canons and other places and towns and topographical points indicated on the map, but no Cougar Canon. [138]

"Mr. Coughlin: That is objected to on the ground that no proper foundation has been laid for the map.

"The Court: You will have to proceed further and lay a foundation.

"Mr. McWilliams: Q. Will you state what you mean when you say that this is an official map in your department?

"A. That is a map that we use for all of our demonstration work in the National Forest, and was prepared in San Francisco from U. S. Surveys, General Land Office Surveys, and our own surveys, it was compiled from all different sources into one map.

"The Court: Who compiled it?

"A. It was done under my supervision by one of the draftsmen.

"Q. It is correct?

"A. It is as far as the information we had.

"Q. Where did you get your information?

"A. From the United States Geological Survey, the General Land Office Survey, and our own surveys, timber surveys.

"The Court: Is that all?

"Mr. McWilliams: Yes.

"Mr. Coughlin: May I further urge the objection that it is hearsay?

"The Court: Overruled.

"Mr. McWilliams: May it be marked as United States Exhibit 1?

"The Court: Yes.

"Mr. Coughlin: We note an exception.

"(The map was marked U. S. Exhibit 2.)"

III.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Mr. McWilliams: I desire to offer these in evidence as one exhibit.

"Mr. Coughlin: To which we object, if your Honor please, on [139] the ground that the proper foundation has not been laid, that they are hearsay.

"The Court: Overruled.

"Mr. Coughlin: Exception.

"(The maps were marked 'U. S. Exhibit 3.')"

IV.

That the court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. What did he state, if anything, as to whether he knew these men?

"Mr. Coughlin: To which we object on the ground that——

"Mr. McWilliams: I will withdraw the question. Proceed with the conversation.

"Mr. Coughlin: I am going to object to this line of testimony on the ground that the corpus delicti has not been proven.

"The Court: Overruled.

"Mr. Coughlin: May I have an exception?

"The Court: Yes."

V.

That the court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. State the conversation that occurred on that occasion?

"Mr. Coughlin: The same objection.

"The Court: Overruled.

"Mr. Coughlin: Note an exception."

VI.

The Court erred in admitting the following testimony over the obpection and exception of the defendant:

"Mr. Coughlin: In order that I do not interrupt may it be understood that my objection goes to this entire line of testimony? [140]

"The Court: Yes.

"Mr. Coughlin: On the ground the corpus delicti has not been proven.

"The Court: Yes. Of course, if it is not connected up you can move to strike it out.

"Mr. McWilliams: Yes, that is stipulated to."

VII.

That the court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. When and where and with whom did you make such an investigation?

"A. Well, on August 18, 1936, I went to the office of Mr. DeWitt Nelson, superintendent of the Tahoe National Forest in Nevada City and searched the maps and records in his office, and questioned Mr. Nelson, and questioned certain of his rangers regarding Cougar Canon, or Lucky Gravel mining claim, and found no information.

"Mr. Coughlin: We object to this and ask that the answer be stricken on the ground it is hearsay.

"Mr. McWilliams: I submit it is not hearsay. It is direct information to the point that there was no such place given.

"The Court: Denied.

"Mr. Coughlin: May I have an exception, your Honor?"

VIII.

That the court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. Did you make inquiries during the course of that trip?

"A. Yes, we interviewed the road supervisor, McFadden, I believe his name was, at Forest Hill, who stated he was very familiar with all of that territory——

"Mr. Coughlin: I submit that this is hearsay testimony and I ask that the answer be stricken out. [141]

"Mr. McWilliams: I submit it comes in under that exception which permits the result of searches to be admitted. We have authorities, if your Honor desires them.

"Mr. Coughlin: He is testifying now to what someone else told him.

"Mr. McWilliams: I have that in mind.

"Mr. Coughlin: That is not admissible.

"Mr. McWilliams: I anticipated that objection and looked up the law, and we have the authorities if necessary.

"Mr. Coughlin: May I have an exception?

"The Court: Yes, the objection is overruled."

IX.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. Did you ever hear of Hans Hensen, G. A. Swissler or Larry Larsen?

"A. No.

"Mr. Coughlin: To which we object on the ground it is immaterial, irrelevant, and incompetent, and calls for the opinion of the witness, and is hearsay.

"The Court: Overruled.

"Mr. Coughlin: Exception."

X.

That the Court etrred in admitting the following testimony over the objection and exception of the defendant:

"Q. Did you ever hear of Hans Hensen or G. A. Swissler, or Larry Larsen as miners in that area?

"Mr. Coughlin: We will interpose the same objection as we have heretofore.

"The Court: Overruled.

"Mr. Coughlin: Note an exception." [142]

XI.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. Are you familiar also with other mining activities in the vicinity where quantities of gravel have been handled besides the quantity that you are particularly familiar with?

"A. Well, during my time there has not been very much gravel mining outside of our own.

"Mr. Coughlin: We ask that the answer be stricken out on the ground it is not responsive.

"The Court: Denied.

"Mr. Coughlin: Exception."

XII.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. Have you ever run across a man by the name of Hans Hensen, G. A. Swissler, or Larry Larsen, miners in that area?

"A. No.

"Mr. Coughlin: Just a moment. We object to that on the ground it calls for a conclusion or opinion as to whether he ever run across them. There is no foundation laid here to show that this man may have known them.

"The Court: He has lived on the Divide all his life. Overruled.

"Mr. Coughlin: Exception."

XIII.

That the Court erred in admitting the following testimony over the objection and exception of defendant:

"Q. What was the character of the establishment that was being operated by him at that time in Nevada City?

"Mr. Coughlin: To which we object on the ground it is immaterial, irrelevant, and incompetent, no time, place, or any- [143] thing else fixed.

"The Court: Overruled.

"Mr. Coughlin: Exception."

XIV.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. Do you know why the grinder is used?

"A. I do.

"Q. Do you know—'Yes' or 'No'?

"A. Yes.

"Q. Will you tell the jury?

"A. The grinder is used to grind quartz rock.

"Q. What kind of quartz rock?

"A. A Quartz rock which bears the gold.

"Mr. Coughlin: I object to that.

"The Court: Overruled.

"Mr. Coughlin: Exception."

XV.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. In your experience over the years, will you state how many gravel mines you have run across or become familiar with that run as high in gold as .56 ounces per cubic yard?

"Mr. Coughlin: I object to that. I do not see the relevancy of it.

"The Court: Overruled.

"Mr. Coughlin: Exception.

"A. I don't recall any."

XVI.

That the Court erred in denying appellant's motion that the Court instruct the jury at this time to return a verdict of not guilty on the ground that the evidence is insufficient to sustain any verdict save and except a verdict of not guilty. [144]

XVII.

That the Court erred in admitting the following testimony over the objection and exception of the defendant:

"Q. Did you know that in the year 1931 he endeavored to get his gold buyer's license, required under the State law, renewed, and that as a result of the protests and the testimony that was given of irregularities in his method of conducting business that his application was denied?

"Mr. Coughlin: To which we object on the ground it is not proper cross-examination, and assuming a fact not in evidence.

"The Court: Overruled.

"Mr. Coughlin: Exception."

XVIII.

That the Court erred in denying appellant's motion for a directed verdict of not guilty by defendant at the conclusion of the entire evidence, which said ruling was duly excepted to by appellant. Said Court erred in this, because there is not sufficient evidence to sustain any other verdict save and except a verdict of not guilty.

XIX.

That the Court erred in denying appellant's motion for a new trial, which said ruling was duly excepted to by appellant. Said Court erred in this, because of all of the aforesaid reasons, and further because of errors of law at the trial of said cause.

Wherefore, the said defendant and appellant, George A. Bost, prays that by reason of the errors aforesaid the judgment and sentence imposed upon him in this cause be reversed and held for naught.

Respectfully submitted,
RAY T. COUGHLIN
JAMES M. HANLEY
Attorneys for Defendant and Appellant. [145]

Service and receipt of copy of the foregoing assignment of errors this 17th day of February, 1938, is hereby acknowledged.

F. J. HENNESSY
United States Attorney.
By ROBERT McWILLIAMS
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 17, 1938. [146]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It is hereby stipulated by and between the plaintiff in the above entitled cause and the defendant and appellant Ben Bost, through and by their re-

spective counsel, that an order may be made by this Court certifying all of the original exhibits not set out in full in the Bill of Exceptions, as a part thereof, and as a part of the record on said appeal, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, February 15th, 1938.

FRANK J. HENNESSY
United States Attorney
By ROBERT McWILLIAMS
Attorneys for Appellee,
JAMES M. HANLEY
RAY T. COUGHLIN
Attorneys for Appellant.

[Endorsed]: Filed Feb. 17, 1938. [147]

[Title of District Court and Cause.]

ORDER RE EXHIBITS

Pursuant to stipulation heretofore entered into by and between the plaintiff and the defendant and appellant Ben Bost, in the above entitled cause, that the exhibits not set out in full in the Bill of Exceptions filed herein be certified to the United States Circuit Court of Appeals for the Ninth Circuit, as a part hereof; and good cause appearing therefore,

It is therefore Ordered that the Clerk of this Court be, and hereby is, directed to certify to the United States Circuit Court of Appeals for the

Ninth Circuit, all such original exhibits herein which are not incorporated in full in said Bill of Exceptions, as a part hereof.

Dated, February 17, 1938.

A. F. ST. SURE
Judge of said Court.

[Endorsed]: Filed Feb. 17, 1938. [148]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of said Court:

Please issue a Transcript of the record to the Circuit Court of Appeals in the above entitled cause in connection with the appeal of the defendant Ben A. Bost, and include therein the following papers and orders, with all filing and other endorsements thereon, to wit:

1. Indictment.
2. Statement of Docket Entries.
3. Arraignment and plea of defendant.
4. Demurrer of defendant, with order overruling the same.
5. The Judgment and sentence of the Court as to the defend*at*, and the verdict as to defendant.
6. Motion for new trial and order denying the same.
7. Minutes showing motion in arrest of judgment and order denying the same. [149]

8. Stipulation and order for extension of time for filing and settlement of Bill of Exceptions and filing Assignment of Errors;

9. Order of Circuit Court of Appeals for Extension of Time for filing and Settlement of Bill of Exceptions and Assignment of errors.

10. Stipulation and order for certification of Exhibits to the United States Circuit Court of Appeals.

11. Bill of Exceptions, and Order of Court approving and settling said Bill of Exceptions.

12. Assignment of Errors.

13. Notice of Appeal by defendant.

14. This Praecipe.

In preparing the foregoing record, please eliminate the title of court and cause.

Dated, April 20, 1938.

JAMES M. HANLEY
RAY T. COUGHLIN
Attorneys for Defendant.

Service of the above admitted this 21st day of April, 1938.

F. J. HENNESSY
United States Attorney
By ROBT. McWILLIAMS
Deputy United States Attorney.

[Endorsed]: Filed Apr. 21, 1938. [150]

[Title of District Court and Cause.]

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV.

(To accompany duplicate notice of appeal to the United States Circuit Court of Appeals.)

1. Indictment for violation of 18 USCA, Sec. 80. (False affidavit—Gold Reserve Act) filed March 30, 1937.
2. Arraignment May 1, 1937.
3. Plea to indictment May 18, 1937.
4. Motion to withdraw plea of guilty denied ....., 19.....
5. Trial by jury, Nov. 23, 24 & 26, 1937.
6. Verdict Nov. 26, 1937.
7. Judgment—(with terms of sentence) five years and $5000.00 fine on count one, five years on each of counts 2, 3, 4 & 5 to run concurrently, entered Dec. 3, 1937.
8. Notice of appeal filed Dec. 9, 1937. [151]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 151 pages, numbered from 1 to 151, inclusive, contain a

full, true, and correct transcript of the records and proceedings in the case entitled United States of America, Plaintiff, vs. Ben A. Bost, Defendant, No. 25961-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $12.35 and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of May, A. D. 1938.

[Seal] WALTER B. MALING
Clerk.

J. P. WELSH
Deputy Clerk. [152]

[Endorsed]: No. 8768. United States Circuit Court of Appeals for the Ninth Circuit. Ben A. Bost, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 29, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8768

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEN A. BOST,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
ROBERT L. McWILLIAMS,
Assistant United States Attorney,
SYDNEY P. MURMAN,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellee.

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No. 8768

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEN A. BOST,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

INTRODUCTION.

As appellant has stated, he was convicted by a jury on a charge of violating Section 80 of Title 18 of the United States Code. His conviction was based on his having knowingly falsified certain material matters in connection with the sale to the Mint of certain gold. The indictment charges that appellant on various specified occasions falsely represented that the gold so sold by him had been mined by him from the "Lucky Gravel" mining claim, which, according to his representations was located in Cougar Canyon, El Dorado County, California, of which claim he said he was the owner, whereas in truth and in fact he was not the owner of any mining claim in that County known as or called the "Lucky Gravel" claim, and

whereas in fact the gold in question had not come from the source specified by him in the verified affidavits submitted by him to the Mint. False affidavits to the same effect were tendered along with the gold offered by him for sale on five different occasions during the years 1934 and 1935.

Counsel for appellant have seen fit in their brief to argue at the outset the points of law advanced by them and then to give a more detailed statement of the facts to the Court. We believe that the Court will follow the testimony more easily if we reverse that order and summarize the facts upon which the indictment was founded before we undertake to consider appellant's legal contentions.

STATEMENT OF THE CASE.

It was the theory of the Government, which was upheld by the verdict of the jury and by the ruling of the Court denying appellant's motion for a new trial (R. p. 39) that the claim of appellant to have recovered the gold in question from this so-called "Lucky Gravel" mining claim, was but a figment of his imagination, and that the gold had in fact been secured by appellant from some other source or sources. The source or sources referred to, although not material in this case, may be inferred to a certain extent from the general tenor of the evidence and particularly from the testimony of Mr. Bongard, who was an employee of the State, and whose business it was to investigate the theft of so-called "high-grade" ore from the mines of California. (R. p. 107.)

Appellant's story of the circumstances under which he secured the gold in question has at least the merit of originality. Unfortunately for appellant, it was neither believed by the jury nor by the trial Court. After considering it one is reminded of the statement of the Supreme Court of Montana in an opinion recently quoted with approval by the Supreme Court of California to the effect that "The credulity of Courts is not to be deemed commensurate with the facility and vehemence with which a witness swears". (*Grant v. Chicago R. Co.,* 252 Pac. 382, quoted by the California Supreme Court in *Herbert v. Lankershim,* 9 Cal. (2d) 409, 472.) The appellant's story of the circumstances under which he had secured the gold in question, which in a period of 18 months aggregated over $15,000, was substantially as follows: In the year 1886 appellant had met a man in Trinity County by the name of Swissler. He had known Swissler there as a boy for a period of eight months. Appellant had not thereafter seen this friend of his youth until he showed up in appellant's assay office 42 years later, being some time in the year 1928. At that time this friend told appellant that he was prospecting and that he would like Bost to put up $250 to help him carry on his work. He told appellant that "he *thought* he would strike pay gravel; that he was in the gravel district". Whereupon and without further investigation upon the part of appellant he turned over the sum requested to Swissler. (R. p. 120.) For this $250 Bost was given a one-half interest in such discovery as Swissler might make. (R. p. 127.) This interest was evidenced by a bill of sale or receipt

which Bost could not find. (R. p. 127.) Swissler was to work the mine when it was discovered, and Bost was to get ten per cent, presumably of the net profits. (R. p. 127.) Bost inquired of Swissler what the name of the mine was and was told that it did not have a name. Bost then said, "We will call it 'The Lucky Gravel' ", to which Swissler agreed. (R. p. 120.) Swissler at that time stated that the mine was in Cougar Canyon, El Dorado County. Bost made no further inquiry in regard to the mine. Thereafter, according to Bost, on several occasions he made additional advances to Swissler. On those visits Swissler would bring over "bits of gold". (R. p. 124.) Bost could not recall how much those lots of gold brought in amounted to but thought that one of those "bits" amounted to 40 ounces, which at the then market value of gold should have been worth in excess of $800. Finally, in October, 1930, when the alleged Swissler called on Bost for more money Bost stated that he did not like to make any more advances unless he saw the mine. Swissler then stated that he would take Bost to it. The trip as described by Bost was made under incredible circumstances. He and Swissler went to the mine at night and returned at night. As a result Mr. Bost was, unfortunately for him, unable to take R. C. Lynn, Agent of the Bureau of Internal Revenue, to the mine when that gentleman, not being satisfied with the story told by Bost, asked him to show the Agent the property from which he said that he had secured the gold sold to the Mint. (R. p. 61.) Moreover, there was an unfortunate inconsistency in the version of that trip as given by

Bost on the witness stand and the version as he had told it to the Agent, as it was testified to by the Agent. Thus Mr. Bost testified on the trial that *Mr. Swissler,* when the subject of the trip to the mine was discussed between them, said that he had an old truck in Nevada City, where Bost then had his office and where the interview occurred, and that they would use that truck in going along the highway to Rattlesnake Bridge below Auburn, where the trail branched off from the highway to the mine. (R. p. 121.) Bost was quite specific in describing the route taken. After leaving Rattlesnake Bridge they traveled up the Middle Fork of the American River a distance of between thirty and forty miles to a point opposite Kennedy Hill. Then they turned off to the right and proceeded along a trail five or six miles until they reached the mine. (R. p. 127.) And yet the mine, which was improved by a 1000-ft. tunnel (R. p. 128) had never been heard of, so far as the record discloses, by anyone other than by appellant and his alleged associates, and could not be located either by appellant or by any of the Government's agents who made a thorough search for it. Agent Lynn's version of the trip, as told him by Bost, varied in very material respects. According to the story told by Bost to Lynn, it was *not Swissler* who had taken Bost to see the mine but one *Hensen.* Moreover, according to the statement made by Bost to Lynn, who testified from his notes made at the time of their conversation and turned over to counsel for appellant for his inspection (R. p. 148), his guide did not take him in the truck referred to by Bost, but in some fashion that was not

made clear by his testimony Bost found his own way to Rattlesnake Bridge, where Hensen met him with some jacks. (R. p. 61.) The two, Bost and Hensen (or Bost and Swissler as the case may have been), started from Rattlesnake Bridge after dark, traveled for about seven hours, arriving at the mine while it was still dark. Bost got up about 7 or 8 o'clock in the morning and, after breakfast, spent about two hours examining the property. (R. p. 128.) He said there was a 2-inch stream of water adjoining the mine which he admitted would be very valuable up in that county. But notwithstanding that fact Bost made no inquiry and no investigation relative to water rights on the stream. (R. p. 129.) He panned about three panfuls of gravel, at the expiration of which time he was tired and rested "all that afternoon and that night until about 4 o'clock the next morning". He then got up and had breakfast and left the mine, reaching Auburn at 1:30. (R. p. 129.) It developed from Bost's testimony on direct examination that he had only made the trip to the property out of curiosity and because Swissler had asked for another advance. (R. p. 120.) But on cross-examination he testified that before they started on the trip Swissler had offered to sell him the remaining half interest in the property for an additional $250. (R. p. 131.) He accepted this offer without having made any investigation of Swissler's title to the property or of the water rights pertaining to it. He admitted that he felt sure that the claim had not been recorded by Swissler because he, Bost, had named the claim himself. He said that he had not thought it necessary to

record the claim in his own name since Swissler "claimed to own the ground". (R. p. 122.) Such claim was entirely inconsistent however with the whole tenor of his direct examination. Moreover, according to Bost's story on cross-examination, when he went on the trip taking the $250 along to buy the second half interest he "couldn't say as to the approximate amount of gold that had been produced by the mine", and turned over to him between the spring of 1928 and October, 1930. (R. p. 131.) Why he took the $250 along instead of making the payment on his return in the event that he decided to make the purchase was not explained by Bost.

The lease that was signed by Bost in January, 1932, was executed under equally mysterious circumstances. At that time it will be borne in mind Bost claimed to own the whole property. The gentleman whose names purported to be signed to the alleged lease, Messrs. Swissler, Hensen and Larsen, are said to have appeared before Bost on or about January 2, 1932. They told Bost that they wanted to take a lease on the mine: "that they wanted to put more men to work there and that they wanted the lease so that they could give the other people a sub-lease". (R. p. 131.) After the execution of the lease, *Hensen* brought in, according to one portion of Bost's testimony, six lots of gold ranging in amount from approximately 80 ounces to approximately 120 ounces. (R. p. 133.) Immediately thereafter Bost testified that after the lease was signed "*Swissler* brought in the gold". (R. p. 133.) Although he was interested in getting his 10 per cent provided

for in the lease he made no record of any kind of the shipments that were brought in.

Suddenly and for some reason that is not clearly explained, the lessees seem to have mysteriously dropped out of existence. After the last shipment of gold Bost saw nothing more of them. He at no time wrote to or received any letters from them. (R. pp. 133, 134.) Although his alleged lessees had leased the property in order to increase the number of men at work and to give a sub-lease on it, Bost had no idea who the parties were to whom the sub-lease was to be given. As he testified, "I had a 10 per cent interest but I had no reason to be interested in who they subleased to nor whether they were capable miners or financially responsible". (R. p. 134.)

In view of the fantastic story told by Bost in attempted explanation of the origin of the gold sold by him to the Mint, it should hardly be necessary to go into the testimony of the Government which was introduced in disproof of appellant's story. Bost's testimony would seem to carry its own refutation upon its face. Nevertheless as a measure of precaution we will summarize the case made out by the Government. At the outset a representative of the United States Forest Service was called (R. p. 51) to identify an official map of the El Dorado National Park. This was offered for the purpose of showing that on this map, which included in detail the territory in which the alleged Lucky Gravel mine was said to have been located, no Cougar Canyon appeared. (The question of the admissibility of this map we

shall consider later.) A representative of the United States Geological Survey also identified certain of the topographic maps made and used by his Department. These maps, which included El Dorado County in detail, were also offered in evidence for the same purpose. (R. p. 54.)

Thereafter witness after witness was called to testify to the non-existence of the alleged Lucky Gravel mine and to a complete lack of knowledge in that locality of any of the alleged lessees of that mine. Thus, R. C. Lynn, the Agent of the Bureau of Internal Revenue who had interrogated Bost in regard to the alleged mine, testified to the search made for it by him. He was familiar with the Rattlesnake Bridge to which Bost had referred and to the highway on which it was constructed. (R. p. 59.) He told of the inquiries he had made and the searches on maps and records in the offices of the different county officials. He told of questioning the Forest Rangers and other Federal officials in that locality but without success. (R. pp. 65, 66.) The Government also called Charles B. Rich of the United States Secret Service (R. p. 96) who testified to his efforts to locate the mythical Lucky Gravel mine. He told of covering all of the territory described by Bost without success. He told of the different inquiries made of State and County officers in that locality and of the examination of the records of the County assessor and of the County Surveyor. He told of the search of the registration list in an effort to secure some information either about the mine or about Messrs. Swissler, Hensen or

Larsen. All of the efforts were without success. (R. pp. 96, 99.)

Mr. John Bongard was also called by the Government. Mr. Bongard was the "high grade" Inspector of the State Division of Mines, which position he had held for ten years. In that office it was his duty to supervise the issuance of licenses to gold buyers and to keep track of "high grading", which he explained referred to the theft of high-grade ore from the different mines of the State. Mr. Bongard told of his inquiries throughout El Dorado County and particularly in the vicinity described by Mr. Bost. He told of the inquiries made throughout that territory. He also testified to his examination of the records of the County Recorder and of the County Assessor in a search for some reference either to the Lucky Gravel mine or to any of the parties connected with it. As he testified "we found no record either of the mine or of the men mentioned". (R. p. 108.)

Thereafter witness after witness from that County was called to testify to his knowledge of the locality involved and to his ignorance of any Lucky Gravel mine as well as of the alleged lessees of that mine. Included among those witnesses were a Deputy Sheriff of the County, and also a mail carrier who had lived in that vicinity for approximately 30 years. (R. p. 79.) Incidentally this witness testified that he had mined for 25 years in that locality and that he had never heard of any Cougar Canyon or of any Lucky Gravel mining claim. Moreover, he testified that during that period of time there had not been much

mining in that locality. He further stated that there had been no real producers outside of those with which he had been connected, since he had moved into the district about 29 years before. He explained that by "real producers" he referred to a mine that would run from 10 cents to 50 cents a cubic yard. (R. p. 81.) It will be recalled that the Lucky Gravel mine, according to appellant's fabulous figures, ran from approximately $15 (R. p. 11) to $36 (R. p. 22) per cubic yard. Among the other witnesses called was a lookout for the Forest Service who had been located about 14 miles East of Georgetown (which was referred to by Bost in his testimony, R. p. 121) for about 16 seasons. He had neither heard of a Cougar Canyon or a Lucky Gravel mine. (R. p. 82.) Just one witness testified that he had heard of a Cougar Canyon, although he had never heard of a Lucky Gravel mine, or of its alleged lessees. (R. pp. 85, 86.) This witness was a lookout of the Forest Service who had resided in the vicinity involved all of his life. (R. p. 87.) It developed that his knowledge of Cougar Canyon was limited to the fact that when he was a boy about 10 years old, and about 48 or 50 years before he was called on to testify, he had heard of a canyon of that name. It also developed from the witness that one or two persons had also asked him about the whereabouts of a Cougar Canyon. No other evidence of the existence of the Canyon was offered. The County Assessor of El Dorado County, who had held that office for 14 years and had resided in the County for approximately 30 years, testified that not only had he never heard of Cougar Canyon or the Lucky

Gravel mine or of the lessees, but that, having charge of the assessment rolls of the County he could testify that there was no record of any assessment against any Lucky Gravel claim or of any tax assessed against any of the lessees named. (R. p. 89.) Similar testimony in regard to his lack of knowledge in his 40 years' residence in that County, of Cougar Canyon or of the Lucky Gravel mine or of the alleged lessees, was given by the County Surveyor. (R. p. 90.) Merchants and other businessmen were called with the same result. Without summarizing further along this line we believe that we may safely assume that the proof was ample that the mine referred to as well as the alleged lessees, never existed.

We now proceed to a consideration of the errors of law alleged by appellants that have been committed by the lower Court.

THE INDICTMENT IS SUFFICIENT.

Counsel at the outset point out in their brief a minor defect in the indictment. A similar defect was referred to by this Court in the comparatively recent case of *Hills v. United States* (97 Fed. (2d) 710). That defect is in the charge in the opening sentence of the indictment (R. p. 1) that the defendant falsified "a material *matter*" instead of "a material *fact*". Counsel refer to the holding of this Court in the *Hills* case that the discrepancy did exist. Counsel fail, however, to give any weight to the statement of this Court that the "deficiency", as it is

termed in the Court's opinion, would be cured were it not for an omission in the indictment of another allegation which the Court held did not appear. That omission, it will be recalled, grew out of the failure to charge that certain fictitious names that had been supplied by an accessory had, in fact, been incorporated and used in the affidavits that had been tendered to the Mint.

This latter defect as it was held to be, does not exist in the instant case because there is no accessory charged in this case. Hence the defect relied on by counsel clearly has no substance.

Moreover, we submit that the so-called deficiency in the reference to a falsification of a matter instead of a fact does not exist in view of the language of the whole indictment. The opening sentence in which the discrepancy appears could have been entirely omitted and the indictment would have been sufficient. But even with the opening sentence included, the point we submit is of no consequence in view of the fact that the sentence refers to matters falsified by the appellant "as hereinafter set forth". The defect, if it is to be regarded as such, certainly could not have prejudiced appellant within the requirement of Section 556 of Title 18, of the U. S. Code.

Appellant urges that "there is nowhere alleged what the material fact is that induced the Treasury Department to purchase the gold". (Br. p. 13.) We submit that there is no necessity that such an allegation appear. Section 80 of Title 18 at one time provided that "Whosoever shall make or cause to be

made, or present or cause to be presented, for payment or approval * * * any claim upon or against the Government of the United States * * * knowing such claim to be false, fictitious or fraudulent; or whoever *for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States* * * * shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device, any material fact * * *'' shall be punished as provided. However, when the section was revised in 1934 the language italicized was omitted. Hence there was not only no necessity of alleging that the misstatement of the appellant had in fact induced the Treasury Department to purchase the gold but no necessity of even alleging that the falsification of the appellant was with the intent of cheating, swindling or defrauding the Government.

Counsel for appellant further urge not only that the indictment is ''vague and indefinite'' but also claim that ''as a matter of fact the falsity of the affidavit itself is not alleged directly and positively as required'' by law. (Br. pp. 14, 15.) We have difficulty in following counsel in view of the language of the indictment, which in our opinion is more complete than was necessary. It will be recalled that the indictment charges in Paragraph III of the First Count:

> ''That on or about the 6th day of April, 1934, said defendant requested of the Mint of the United States, located at San Francisco, Cali-

fornia, which was then and there an agency of the Treasury Department of the United States, that it purchase certain gold that was then and there tendered by him to said Mint for sale; that for the purpose of inducing said Mint to purchase said gold, and in purported compliance with said regulations above mentioned, said deposit of gold was accompanied by an affidavit executed by said defendant, a copy of which affidavit is hereunto annexed, marked Exhibit 'A', and made a part hereof; that in and by the terms of said affidavit, said defendant wilfully, knowingly and unlawfully, and contrary to his oath in said affidavit taken, declared, certified and swore to certain material matters which were not true and which he did not believe to be true when he swore to said affidavit, to-wit: That he was the owner of a mining claim called the 'Lucky Gravel' claim, and that the source of said gold so tendered and deposited was 'Lucky Gravel claim, mostly small nuggets', and that said gold had been recovered from said claim, which claim it was stated in said affidavit was located in Cougar Canyon, El Dorado County, California, whereas in truth and in fact as said defendant then and there well knew, he was not the owner of any mining claim in said County and State, known as or called the Lucky Gravel claim, and whereas in truth and in fact the source of said gold was not said Lucky Gravel claim, and said gold had not been recovered from said alleged claim, which facts said defendant at all times well knew." (R. pp. 3-4.)

Similar allegations appear in the other counts in the indictment. Counsel state that the portion of the

paragraph reading "whereas in truth and in fact as said defendant then and there well knew, he was not the owner of any Lucky Gravel claim, and in truth and in fact the source of the gold was not the Lucky Gravel claim and the gold had not been recovered therefrom", are "words of recital only and are not positive and direct allegations of falsity". No authorities are cited in support of this claim and, we submit, for obvious reasons. Counsel do not suggest how the allegation could have been made more directly or more positively and we are at a loss to know even with the assistance of counsel's comments how it could have been made more positive or direct.

Appellant next urges that the counts in the indictment are uncertain "in that they do not directly allege that the gold which Bost deposited for sale with the Mint was the class or type of gold which required a filing of the affidavit in question", (Br. p. 17), nor that the misrepresentations were material. (Br. p. 19.) No authorities are cited in support of this contention. We submit that it is without merit. Section 35 of the Regulations* provides that the Mints are authorized to purchase certain kinds of gold. Included among the kinds specified is "gold recovered from natural deposits in the United States or places subject to the jurisdiction thereof, and which shall not have entered into monetary or industrial use". Section 38 of the Regulations provides that the Mints shall not purchase gold under the clause just quoted "unless the deposit of such gold is accompanied by

*This Court will of course take judicial notice of the Regulations referred to, since they were authorized by Congress. (31 U. S. C. §442; *Caha v. U. S.*, 152 U. S. 211.)

a properly executed affidavit", on Form TG-19, which must be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States, with certain exceptions not here relevant.

According to appellant's contention (Br. p. 18) "it should have been definitely and positively alleged in all five counts just what type or class of gold was deposited with the Mint * * *"

We submit that it was not necessary to allege any more than was alleged. Of course it is elementary that Government regulations such as those involved have the force and effect of law. *(F. T. Dooley Lumber Co. v. U. S.,* 63 Fed. (2d) 384, 386.) In the instant case appellant represented that he was one of the persons who came within one of the classifications mentioned in the Regulations, and that the gold that he offered for sale had been recovered by him by mining or panning in the United States, and that he had recovered the gold from a certain specified mine during a certain specified period of time. These sworn statements so made to the Government have been found by the jury to be false. Whether or not the facts required to be specified were material was for the executive branch of the Government to determine. Since it did require those facts to be specified, this Court must presume that its action in making such a requirement was reasonable. The fact that the Government did see fit to require such representations in connection with the sale of gold of the type described is sufficient proof that the representations were material. Say counsel for appellant: "to plead

him (appellant) within Section 80 for having filed a false affidavit with said gold, the Government had to specifically plead facts to show that Mr. Bost deposited gold of the type requiring this particular affidavit". (Br. p. 20.) According to this logic had appellant imported gold from a foreign country and then sold it to the Mint on the written representation that the gold had been recovered by him by mining or panning it from a mine located within the United States, he could not have been successfully prosecuted notwithstanding his conceded misrepresentation, because, according to appellant, it would have been necessary for the Government to specifically plead facts showing that Bost had sold it gold "of the type requiring this particular affidavit". Obviously this could not have been done under the circumstances and hence a prosecution could not have been successfully maintained. Such an argument is obviously unsound.

Likewise, without substance is the contention (Br. p. 20) that the indictment is defective in that it does not allege "that the Federal Government ever purchased the gold deposited by Mr. Bost or in any way relied upon the affidavit filed by him, or that it was misled thereby". No such requirement appears in the law. The charge is not that the defendant secured the purchase price of the gold by having made false and fraudulent representations that were relied on by the Government, but merely that he wilfully falsified certain material facts in a matter within the jurisdiction of a department of the United States. So to do is a violation of the statute involved.

THE MAPS OFFERED IN EVIDENCE WERE ADMISSIBLE.

It will be recalled that the Government offered in evidence as part of its case in chief, certain maps. One of the maps (Government's Exhibit 2), was identified by one H. C. Sedelmeyer, a Civil Engineer employed in the United States Forest Service. He testified that he had been engaged in that branch of the Government for 25 years. The map identified by him bears the inscription:

U. S. Department of Agriculture
Forest Service
El Dorado National Forest
California-Nevada
Mt. Diablo Meridian

The witness testified that the map was an official map of his department. He also testified that it was prepared from United States surveys, General Land Office surveys and from the surveys of the Forest Service, by one of the draftsmen in his office under his own supervision. (R. p. 52.) The other maps referred to (Government's Exhibit 3) were the usual topographic maps in common use. They bore the official inscription "Department of the Interior—U. S. Geological Survey". (R. p. 54.) They were identified by one H. D. McGlashan, Assistant Geological Engineer in the employ of the United States. Mr. McGlashan testified that he had been with the United States Geological Survey for 31 years. The maps in question, he stated, had been received from the Washington office of the United States Geological Survey and were the official maps used in that de-

partment. The maps were offered, as was explained, for the purpose of showing that on none of them, notwithstanding the detail with which they were prepared, did Cougar Canyon appear, though many other canyons and other topographic features were shown.

The law is well settled that such documents are admissible in evidence. As this Court held in the case of *United States v. Romaine* (255 Fed. 253) maps of the United States Coast and Geodetic Survey "should be taken as absolutely establishing the truth of all that they purport to show".

The maps constituting both Exhibits 2 and 3 are admissible in evidence under a well settled exception to the hearsay rule. The particular exception has to do with official records. Many types of official documents are admissible under it, including records, registers, maps and miscellaneous documents. (See *Sheehan v. Vedder,* 108 Cal. App. 419, 425-6.) One class of such records has been before the Court frequently in recent years. Those records are reports of physicians of the Veterans Bureau on examinations of claimants for disability compensation. As was pointed out by the Circuit Court of Appeals for the Fourth Circuit in the case of

Long v. U. S., 59 F. (2d) 602,

they fall clearly within the principle under which exceptions to the hearsay rule are admitted, namely: necessity and circumstantial guaranty of trustworthiness. Said the Court in that case:

> "As to trustworthiness, it is made by an official of the government in the regular course of duty,

> who presumably has no motive to state anything but the truth, and it is made to be acted upon, and is acted upon, in matters of importance by officials of the government in the discharge of their duties."

It was at one time believed that such official records were not admissible unless there was a statute expressly requiring them to be kept. This rule is no longer followed. As the Supreme Court of the United States held in the case of

Sandy White v. U. S., 164 U. S. 100, 103,

in ruling that a record book kept by the jailer of a public jail in Alabama was admissible:

> "Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it. In that case the entries are competent evidence."

The Third Circuit Court of Appeals held to the same effect in the case of

Chesapeake & Delaware Canal Co. v. U. S., 240 Fed. 903, 907,

in holding that certain records kept by the United States Treasurer were admissible:

> "We understand the general rule to be that when a public officer is required, either by statute or the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordi-

> narily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually kept by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage."

This Court has held to the same effect in

Greenbaum v. U. S., 80 Fed. (2d) 113, 126.

In fact it is not required that the keeping of the books or other records be essential to the conduct of the office. It is sufficient if the keeping of such records constitutes a convenience in connection with the conduct of such office.

> "Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record."

This statement was quoted with approval in

People v. Tomalty, 14 Cal. App. 224, 231.

It is obvious that all of the reasons advanced by the different Courts referred to above apply fully to the

question of the admissibility of the maps received in evidence.

Of course the maps were not conclusive. It was entirely competent for appellant to prove that a Cougar Canyon did exist somewhere in the vicinity where he claimed that the Lucky Gravel Mine was to be found. However, appellant made no attempt, except by his own unsupported testimony, to prove the existence of a Cougar Canyon or a Lucky Gravel Mine.

THE TESTIMONY OF AGENT LYNN REGARDING HIS CONVERSATION WITH APPELLANT WAS ADMISSIBLE.

Counsel for appellant next urge (Brief p. 27) that the Court erred in admitting the testimony of R. C. Lynn of the Bureau of Internal Revenue in regard to the conversation he had with appellant prior to the latter's arrest. The only objections urged in the lower Court (R. pp. 58, 60) were that "the corpus delicti has not been proved". This mere statement of the point should be sufficient to dispose of it without further argument. It is true that in conspiracy cases it has been held at times that a conversation between one of the alleged conspirators and a government officer is inadmissible until a "corpus delicti" has been proved. However, the preferred doctrine today is that it is entirely within the discretion of the lower Court whether it will allow evidence of such conversations prior to the proof of the conspiracy. No similar requirement in either form

exists as a preliminary to the admission of proof of a conversation with a defendant under the circumstances shown in this case.

THE TESTIMONY REGARDING THE SEARCHES MADE AND THE ANSWERS TO INQUIRIES WAS ADMISSIBLE.

Appellant's next contention (Brief p. 30) is that the Court erred in allowing testimony to be given through certain witnesses called by the government regarding the result of the searches made for a Cougar Canyon and a Lucky Gravel Mine. The objections interposed to this line of testimony were that it was hearsay. (R. pp. 65, 77 et seq.) This objection, like the one interposed to the admissibility of the official maps offered by the government, overlooks a settled exception to the hearsay rule under which answers to inquiries made regarding the whereabouts of a certain person are admissible. This question was passed upon by the Circuit Court of Appeals for the Fifth Circuit in the case of

Nichols v. U. S., 48 F. (2d) 46.

In that case the defendant had been charged with using the mails to defraud by procuring the issuance of life insurance policies to fictitious persons. In order to prove that the persons were fictitious, it was held that testimony of persons living in the town where an insured was claimed to live, such as the postmaster, that they had never known of such a person there, that his name was not in the city directory or in the telephone books, and that on inquiry they could not learn of him, was admissible. As the Court said,

"Had they been persons with no special opportunity to know the residents of Lakeland, and had they made no inquiry for Smith, their not knowing him would have proven nothing. But the burden of showing that no such person had lived in Lakeland could have been borne in no other way than by such proof as was offered. While not a demonstration, it was some evidence of the negative fact to be proved."

The matter has also been passed upon by the California Supreme Court in the case of

People v. Eppinger, 105 Cal. 36.

It appears that a defendant had been charged with forgery in having made a fictitious instrument purporting to be the check of a person who was claimed by the state to have no existence. To prove the nonexistence of the maker, a city directory was offered and received in evidence. It was held on appeal that it had been properly admitted. It was also held that evidence of a police officer that he had made inquiries regarding the alleged payee of the check without success, was admissible. As the Court said:

"The character of the directory, and the extent of the inquiries, might affect the weight but not the competency, of the evidence."

Again in the case of

People v. Sanders, 114 Cal. 216,

a defendant had been charged with the forgery of a draft. The defendant testified to money having been paid by one Knausch on account of the purchase price of certain land that was involved in connection with

the alleged transaction. The prosecution claimed that Knausch had no existence. The prosecution called the sheriff of the county and proved by him that he had made search and inquiry as to the existence and whereabouts of the alleged Knausch. He testified, as the Court's opinion states, (p. 234) that he had inquired of Knausch from all the old citizens and at every hotel, livery stable and railroad ticket office in Fresno County; that he had carried on similar investigations all over the state for over a year and during the whole time he had never found a man who had ever known or heard of John Knausch. The defendant objected to the introduction of this evidence on the ground that it was hearsay. (p. 219.) The Court held that the evidence was admissible.

Nor is this doctrine merely a California one. In the Michigan case of

People v. Sharp, 19 N. W. 168,

on trial on a charge of forgery, the government, in order to prove that an alleged subscribing witness did not exist, offered the testimony of the sheriff. Said the Court:

> "The sheriff's testimony of his inability to find or hear of any such man as the one whose name appeared as the second subscribing witness, was properly received. There is no other way in showing that a name is fictitious. The extent of his search and opportunities would go to the weight, but not to the competency, of his testimony."

This disposes of the arguments advanced by appellant. We submit that the appeal is without merit

and that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
December 14, 1938.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

ROBERT L. MCWILLIAMS,
Assistant United States Attorney,

SYDNEY P. MURMAN,
Assistant United States Attorney,

Attorneys for Appellee.

No. 8809

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOE MAZUROSKY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

EDWIN D. HICKS,
515 Pacific Building,
Portland, Oregon,
for the Appellant

CARL C. DONAUGH,
United States Attorney,
J. MASON DILLARD and
MANLEY B. STRAYER,
Assistant United States Attorneys
for the Appellee.

In the District Court of the United States
for the District of Oregon

No. C-15297

UNITED STATES OF AMERICA,

vs.

JOE MAZUROSKY,

Defendant.

NOTICE OF APPEAL

Name and address of appellant: Joe Mazurosky, 202 N. W. 6th St., Portland, Oregon.

Name and address of appellant's attorney: Edwin D. Hicks, 515 Pacific Bldg., Portland, Oregon.

Offense: Crime of unlawfully using United States mails in furtherance of a scheme to defraud, as charged in Count 4 of the indictment; unlawfully conspiring to use the United States mails in furtherance of a scheme to defraud, as charged in Count 7 of the indictment, and unlawfully conspiring to use the United States mails in furtherance of a scheme to defraud, as charged in Count 8 of the indictment.

Date of Judgment: March 19th, 1938.

Brief Description of Judgment, or Sentence:

A fine of $1,000 and imprisonment in a Federal penitentiary for 5 years, and from and after the expiration of said term until said fine be paid, for the offense charged in Count 4 of the indictment; a fine in the sum of $5,000 and imprisonment for 2 years in a Federal penitentiary, and from and after the expiration of said term until said fine be paid, on Count 7 of the indictment; a fine in the sum of $5,000 and imprisonment for 2 years in a Federal penitentiary, and from and after the expiration of said term until said fine be paid, on Count 8 of the indictment; Counts 7 and 8 to run concurrently and to begin to run after termination of sentence imposed for the offense charged in Count 4 of the indictment, making a total sentence of $11,000 and 7 years imprisonment.

Name of prison where now confined if not on bail; Multnomah County Jail, Multnomah County Court House, Portland, Oregon.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit from the judgment above mentioned, on the grounds set forth below.

JOE MAZUROSKY
Appellant
EDWIN D. HICKS
Attorney for Appellant

Dated: March 24th, 1938. [1*]

Grounds of Appeal:

1. Error in overruling and denying defendant's Motion for a directed verdict as to Counts 4, 7 and 8 of the indictment.

2. Error in admitting testimony of transactions not pleaded in the indictment and occurring 9 years before the first offense set forth in the indictment.

3. Error in admitting declarations of one Roy Martin to prove an alleged conspiracy between the defendant and the said Roy Martin.

4. Error in the form and substance of the sentence imposed.

State of Oregon,
County of Multnomah—ss.

Due service of the within Notice of Appeal is hereby accepted in Multnomah County, Oregon, this 24th day of March, 1938, by receiving a copy

*Page numbering appearing at the foot of page of original certified Transcript of Record.

thereof, duly certified to as such by Edwin D. Hicks, of Attorneys for Defendant and Appellant.

CARL C. DONAUGH
United States Attorney for
the District of Oregon
By J. MASON DILLARD
Deputy.

[Endorsed]: Filed Mar. 24. 1938. [2]

In the District Court of the United States for the District of Oregon.

November Term, 1937

Be it remembered, that on the 8th day of February, 1938, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment in words and figures as follows, to wit: [3]

[Title of District Court and Cause.]

INDICTMENT FOR VIOLATION
of Sections 338 and 88, Title 18, U. S. C. A.

United States of America,
District of Oregon—ss.

The Grand Jurors of the United States of America for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations do find, charge, allege and present:

That on the 27th day of October, 1937, the Grand Jury of the United States for the District of Oregon returned an indictment herein, No. C-15202,

which said indictment was, on February 2, 1938, by order of the above-entitled court resubmitted to said Grand Jury; that this indictment is returned in lieu of and replaces said original indictment and Count One hereof charges the identical offense charged in Count One of said original indictment, and Counts Seven and Eight replace Count Five of said original indictment and charge offenses identical with and included within said Count Five.

And the Grand Jurors aforesaid further find, charge, allege and present:

Count One:

That Joe Mazurosky, the defendant above-named, prior to September 12, 1934, the exact date being to the Grand Jurors unknown, acting jointly with Roy L. Martin, alias Dr. Miles, alias O. C. Stone; Herbert C. Crangle, alias Dr. Avery; John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and Thomas A. Andrews, alias Judge Thomas, together with other persons to the Grand Jurors unknown, did devise a certain artifice and scheme to defraud and, by means of false and fraudulent pretenses, representations and promises, to obtain money and property from a certain class of persons, including one Christine M. Mershon, then resident in divers communities within [4] the United States, who, by reason of age or infirmities and a lack of knowledge and experience concerning medical and surgical practice, could be induced to give credulity to the false representations hereinafter more particularly described; that said scheme and artifice and pre-

tenses, representations and promises then and there were to be and were in substance as follows, that is to say:

It was a part of said scheme and artifice that the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, and the said Herbert C. Crangle, alias Dr. Avery, should call at the respective homes of each of said intended victims, where the said Herbert C. Crangle should represent himself as a noted eye specialist and that his name was Dr. Avery, and that he should make an examination of the eyes of the said intended victim and should then represent to him that he had a growth in one of his eyes and that he would call into the home of the said intended victim a Dr. Miles, who accompanied him; that the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, should thereupon enter the home of the said intended victim and should represent himself to be Dr. Miles, a noted eye specialist, and should thereupon examine the eyes of the said intended victim and inform him that there was a growth on the nerve between one of his eyes and his brain, and that unless it was removed immediately he would lose his eyesight and his brain would be affected; that the said Herbert C. Crangle, alias Dr. Avery, and the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, would represent to the said intended victim that the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, was competent to perform said operation and that they would return in a few days and perform said operation;

that the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, together with the said Herbert C. Crangle, alias Dr. Avery, would later return to the home of the said intended victim and at said time should then pretend to perform an operation on one of the eyes of the said intended victim and should pretend to remove from the said eye a thin substance, which they should represent to the said intended victim to be a growth, and should obtain from the said intended victim as payment for said pretended operation large sums of money; [5]

That it was further a part of said scheme and artifice that thereafter the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, together with the said Thomas A. Andrews, alias Judge Thomas, would go to the home of the said intended victim, where the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, would represent himself to the said intended victim to be an eye specialist; that he would then represent to him that he had been sent there by Dr. Avery to make an examination of his eye to determine whether the operation previously performed had been successful; that the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, would then pretend to make an examination of the said eye and would inform the said intended victim that the growth had not been entirely removed and would return unless further treated; that there was only one treatment for such a condition, which was by means of a so-called radium belt; that said radium belts were so

valuable that it was necessary to make a deposit to guarantee the return of the belt, and that when it was returned the deposit would be refunded, minus $1.00 a day rental for the time it had been used; that the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, would then represent to the said intended victim that he could secure such a radium belt for him from Judge Thomas; that the said Thomas A. Andrews, alias Judge Thomas, would thereupon enter the home of the said intended victim and would represent to him that his name was Judge Thomas; that he was attorney for Dr. Avery; that his daughter had one of said radium belts and that he would send it to him within a few days; that the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and Thomas A. Andrews, alias Judge Thomas, would thereupon represent to the said intended victim that he must pay them a large sum of money as a deposit for said belt, and that they should then and there obtain a check in such amount by then and there representing to him that said radium belt would be sent to him within a few days;

That the said pretenses, representations and promises, as the said defendant and the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone; Herbert C. Crangle, alias Dr. Avery; John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and Thomas A. Andrews, alias Judge [6] Thomas, and each of them, when so devising said scheme and artifice and when so executing and attempting to execute the same, well knew and intended, and at the time of

the committing by them of the offense in this count charged did well know and intend, were and would be false and fraudulent pretenses, representations and promises, in this: That the true name of the said Roy L. Martin was not Dr. Miles and he was not a noted eye specialist; that the true name of the said Herbert C. Crangle was not Dr. Avery and that he was not a noted eye specialist; that the said intended victim would not at any time have a growth upon one of his eyes; that the examination of his eyes by the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, and Herbert C. Crangle, alias Dr. Avery, would not disclose a growth upon one of said eyes and that they were not competent to remove any such growth; that the thin substance which the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, should pretend to remove from the eye of the said intended victim would not be and was not a growth and would not be removed from one of her eyes, but would be, and was in fact, a thin piece of material which the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone, would during said pretended operation secretly place upon said eye; that the true name of the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, was not Dr. Pierce nor Dr. H. J. Pierce; that the said intended victim would not be, at the time of the pretended examination by the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, suffering from any abnormal condition of the eye and would not require any treatment there-

for; that there was not and is not in existence any such apparatus known as a radium belt, designed for treatment of the human eye; that the true name of the said Thomas A. Andrews was not Judge Thomas; that he was not an attorney, and that his daughter did not have one of said radium belts; that the said check to be obtained from the said intended victim would not be used as a deposit for the safe return of any such radium belt, but would be cashed [7] by the defendant, Joe Mazurosky, and the proceeds thereof would be converted to the own use of the defendant and the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and Thomas A. Andrews, alias Judge Thomas.

It was further a part of said scheme and artifice of defendant and the said Roy L. Martin, alias Dr. Miles, alias O. C. Stone; Herbert C. Crangle, alias Dr. Avery; John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and Thomas A. Andrews, alias Judge Thomas, that they should, by means aforesaid and by the pretenses, representations and promises aforesaid, to be made to the said intended victims, to obtain from each of them money and valuable property as aforesaid, which money and property they would, according to said scheme and artifice, unlawfully convert to their own use and benefit, and to the use and benefit of each of them, and would thereby defraud the said intended victims and each thereof.

That thereafter, and on or about the 30th day of October, 1934, the exact date being to the Grand Jurors unknown, the said false and fraudulent pretenses, representations and promises having been made to the said Christine M. Mershon, and the defendant and the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and Thomas A. Andrews, alias Judge Thomas, having secured from the said Christine M. Mershon, by means of said false and fraudulent promises and representations, a check in the sum of $450, and while said scheme and artifice was still in effect, the said defendant, Joe Mazurosky, for the purpose of executing said scheme and artifice to defraud and to obtain money and property from the said Christine M. Mershon, did, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, unlawfully, knowingly, wilfully and feloniously place and cause to be placed in the United States Post Office at Portland, Oregon, to be sent and delivered by the Post Office Establishment of the United States, according to the address and direction thereon, a [8] letter enclosed in a post-paid envelope, addressed to the Federal Reserve Bank at Seattle, Washington, from the Federal Reserve Bank at Portland, Oregon, a further description of said letter being to the Grand Jurors unknown, but said letter containing a check which was in words and figures as follows, to-wit:

"Oct 29 1934 No.

Arlington State Bank

Write Name of Your Bank (City and State) On This Line

Arlington Wash

Pay to the Order of H. J. Pierce $450.00

Four hundred Fifty & no/100 Dollars

For value received I claim that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof.

CHRISTINE M. MERSHON

Address "

John Willy

Chicago Form 158

Stamps on Face

"92" (In Circle) "N. P. 24-6" (In Square)

"Savings Teller No. 2

Oct

30

1934

24-6"

(In Circle)

(Reverse Side)

"H. J. Pierce

O. C. Stone

Joe Mazurosky"

(Stamps)

"Pay to the Order of Any Bank, Banker or Trust Co. All Prior Endorsements Guaranteed. 24-6.

Oct 30 1934. The Bank of California, N. A., Portland, Oregon."

"Pay to the order of any Bank or Banker or through the Portland Clearing House. All Prior Endorsements Guaranteed. Oct 30 1934. 24-1 Portland Branch 24-1. Federal Reserve Bank of San Francisco."

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [9]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

Count Two:

That Joe Mazurosky, the defendant above-named, prior to September 12, 1935, the exact date being to the Grand Jurors unknown, acting jointly with Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, together with other persons to the Grand Jurors unknown, did devise a certain artifice and scheme to defraud and, by means of false and fraudulent pretenses, representations and promises, to obtain money and property from a certain class of persons, including H. F. Belter, then residents in divers communities within the United States, who, by reason of age or infirmities and a lack of knowledge and experience concerning medical and surgical practice, could be induced to give credulity to the false representations hereinafter more particularly described; that said scheme and artifice and pretenses, representations

and promises then and there were to be and were in substance as follows, that is to say:

It was a part of said scheme and artifice of the said defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, that the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, would call at the respective homes of each of said intended victims, at which time one of said persons would represent himself to the said intended victims to be a representative of a spectacle company and would represent the other of said persons to be an eye specialist; that they would pretend to examine the eyes of the said intended victim and would represent to him that he had a cataract over one of his eyes; that they would represent to the said intended victim that the only remedy was a radium treatment, which cost about $75.00 a drop, and that the said Dr. Pierce was competent to perform an operation to remove said cataract; that the said person representing himself to be Dr. [10] Pierce would then pretend to perform an operation upon one of the eyes of the said intended victim and would pretend to remove therefrom a small piece of material, which they would represent to be a cataract; that they would thereupon charge and obtain from the said intended victim large sums of money in payment for said operation, which were, according to the said scheme and artifice of defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, to be unlawfully converted by

them to their own use and the use of each of them;

That the said pretenses, representations and promises, as the said defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, and each of them, when so devising said scheme and artifice and when so executing and attempting to execute the same, well knew and intended, and at the time of the committing by them of the offense in this count charged, did well know and intend, were and would be false and fraudulent pretenses, representations and promises, in this: That neither the said Frank Faircloth, alias Dr. Pierce, nor the said William H. Londergan, Jr., alias J. C. Adams, was a representative of a spectacle company, nor was either of said persons an eye specialist; that said intended victim would not have a cataract over one of his eyes; that the said Dr. Pierce was not competent to perform an operation to remove such cataract; that the said person representing himself to be Dr. Pierce would not remove a cataract from the eye of the said intended victim, and that the small piece of material which the said person representing himself to be Dr. Pierce would pretend to remove from said eye of said intended victim would not be and was not a cataract and would not be removed from one of his eyes, but would be, and was in fact, a thin piece of material which the said person representing himself to be Dr. Pierce would during said pretended operation secretly place upon said eye. [11]

It was further a part of said scheme and artifice of defendant and the said Frank Faircloth, alias

Dr. Pierce, and William H. Londergan, Jr., that they should, by means aforesaid, and by the pretenses, representations and promises aforesaid, to be made to the said intended victims, obtain from them money and valuable property as aforesaid, which money and property they would, according to said scheme and artifice, unlawfully convert to their own use and benefit, and to the use and benefit of each of them, and would thereby defraud the said intended victims.

That thereafter, and on or about the 20th day of September, 1935, the exact date being to the Grand Jurors unknown, the said false and fraudulent pretenses, representations and promises having been made to the said H. F. Belter, and the defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., having secured from the said H. F. Belter, by means of said false and fraudulent promises and representations, a check in the sum of $500, and while said scheme and artifice was still in effect, the said defendant, Joe Mazurosky, for the purpose of executing said scheme and artifice to defraud and to obtain money and property from the said H. F. Belter, did, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, unlawfully, knowingly, wilfully and feloniously place and cause to be placed in the United States Post Office at Portland, Oregon, to be sent and delivered by the Post Office Establishment of the United States according to the address and direction thereon, a letter enclosed in a postpaid envelope, addressed to the Federal Reserve

Bank at Spokane, Washington, from the Federal Reserve Bank at Portland, Oregon, a further description of said letter being to the Grand Jurors unknown, but which said letter contained a check which was in words and figures as follows, to-wit:

[12]

(Picture) "The First National Bank 98-147

Kennewick, Wash. Sept 20 1935

Pay to the
Order of J. C. Adams $500.00
Five Hundred and.....no/100 Dollars
No. 345 H. F. BELTER
Safe
Deposit Boxes
For
Rent
(In Diamond)
(Stamps) "N. P.
"92" (In Circle) 24-6" (In Square)

(Reverse Side)

"J. C. Adams
Joe Mazurosky"
(Stamps)

"Pay to the Order of Any Bank, Banker or Trust Co. Prior Indorsements Guaranteed. 24-6 Sep 20 1935 24-6. The Bank of California, N. A., Portland, Oregon".

"* * any Bank or Banker or * * the Portland Clearing House. All Prior Endorsements Guaranteed. Sep 20 1935. 24-1 Portland Branch 24-1 Federal Reserve Bank of San Francisco".

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [13]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count Three:

That Joe Mazurosky, the defendant above-named, prior to September 12, 1935, the exact date being to the Grand Jurors unknown, acting jointly with Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, together with other persons to the Grand Jurors unknown, did devise a certain artifice and scheme to defraud and, by means of false and fraudulent pretenses, representations and promises, to obtain money and property from a certain class of persons, including one H. F. Belter, then resident in divers communities within the United States, who, by reason of age or infirmities and a lack of knowledge and experience concerning medical and surgical practice, could be induced to give credulity to the false representations herein described; that said scheme and artifice and pretenses, representations and promises were identical with those described in Count Two of this indictment and the allegations of Count Two descriptive of said scheme and artifice and pretenses, rep-

resentations and promises, and the falsity thereof, are hereby referred to and by reference incorporated herein as if here repeated;

That thereafter, and on or about the ..... day of September, 1935, the exact date being to the Grand Jurors unknown, the said false and fraudulent pretenses, representations and promises having been made to the said H. F. Belter, and the defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., having secured from the said H. F. Belter, by means of said false and fraudulent promises and representations the said check in the sum of $500 mentioned in said Count Two of this indictment, and while said scheme and artifice was still in effect, the said defendant, Joe Mazurosky, for the purpose of executing said scheme and artifice to defraud and to obtain money and property from the said H. F. Belter, [14] did, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, unlawfully, knowingly, wilfully and feloniously place and cause to be placed in the United States Post Office at Portland, Oregon, to be sent and delivered by the Post Office Establishment of the United States according to the address and direction thereon, a letter enclosed in a postpaid envelope, addressed to the First National Bank at Kennewick, Washington, from the Bank of California, N. A., of Portland, Oregon, a further description of said letter being to the Grand Jurors unknown, but which said letter contained a check which was in words and figures as follows, to-wit:

"(Picture)" "The First National Bank 98-147
Kennewick, Wash. Sept 20 1935
Pay to the Order of J C Adams $500 00
Five Hundred and———no/100 Dollars
H F BELTER"

No. 345 (In Diamond)
Safe Deposit
Boxes for Rent

(Stamps) "92" (In Circle)
"Please Report By This (In Square)
No. 68646
The Bank of California
National Association
Portland, Ore."
"N P (In Square)
24-6"

(Reverse Side)

"Pay to the Order of any Bank Banker or Trust Co
Prior indorsements guaranteed
24-6 Sep 20 1935 24-6
The Bank of California, N. A.
Portland, Oregon"
"* * * any Bank or Banker or
* * * the Portland Clearing House
All prior endorsements guaranteed
Sep 20 1935
24-1 Portland Branch 24-1
Federal Reserve Bank of San Francisco"

"Pay to the Order of any Bank or Banker or through the Spokane Clearing House
All prior endorsements guaranteed
Sep 21 1935
28-1 Spokane Branch 28-1
Federal Reserve Bank of San Francisco"

"Cancelled
Spokane Branch
Sep 24, 1935
Federal Reserve Bank"

"Cancelled
Spokane Branch
Sep 24, 1935
Federal Reserve Bank" [15]

"Cancelled
Federal Reserve Bank
Sep 25, 1935
Portland Branch"

"Pay any Bank or Banker
All previous endorsements guaranteed
24-6 Sep 27 1935 24-6
The Bank of California, N. A.
Portland, Oregon"

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [16]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Court Four:

That Joe Mazurosky, the defendant above-named, prior to September 12, 1935, the exact date being to the Grand Jurors unknown, acting jointly with Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, together with other persons to the Grand Jurors unknown, did devise a certain artifice and scheme to defraud and, by means of false and fraudulent pretenses, representations and promises, to obtain money and property from a certain class of persons, including one H. F. Belter, then resident in divers communities within the United States, who, by reason of age or infirmities and a lack of knowledge and experience concerning medical and surgical practice, could be induced to give credulity to the false representations herein described; that said scheme and artifice and pretenses, representations and promises were identical with those described in Count Two of this indictment and the allegations of Count Two descriptive of said scheme and artifice and pretenses, representations and promises, and the falsity thereof, are hereby referred to and by reference incorporated herein as if here repeated;

That thereafter*m*, and on or about the 28th day of September, 1935, the exact date being to the Grand Jurors unknown, the said false and fraudulent pretenses, representations and promises having been made to the said H. F. Belter, and the defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., having secured from the said H. F. Belter, by means of said false and fraudulent promises and representations the

said check in the sum of $500 mentioned in said Count Two of this indictment, and while said scheme and artifice was still in effect, the said defendant, Joe Mazurosky, for the purpose of executing said scheme and artifice to defraud and to obtain money and property from the said H. F. Belter, [17] did unlawfully, knowingly, wilfully and feloniously place and cause to be placed in the United States Post Office at Kennewick, Washington, and sent and delivered to the addressee thereof by the Post Office Establishment of the United States, according to the address and direction thereon, a letter enclosed in a postpaid envelope, addressed to the Bank of California, N. A., at Portland, in the State and District of Oregon, from The First National Bank, Kennewick, Washington, a further description of said letter being to the Grand Jurors unknown, but which said letter contained a bank draft which was in words and figures as follows, to-wit:

"(Picture)" The First National Bank 98-147 12
Kennewick, Wash., Sep 28 1935 193
No. 40246

Pay to the Order of The Bank of California, N. A., Portland, Oregon $499.50

First Nat'l
Kennewick $499 and 50 cts

To The First National Bank
24-4 Portland, Oregon
Insured against fraudulent alteration
Todd Bankers Supply

JAY D BLISS
Cashier"

(Reverse Side)

(Stamps)

"Received Payment Thru Clearing House
24-6
Sep 30 1935
Portland
Oregon
The Bank of California, N. A."

"Received Payment Thru Clearing House
24-6
Sep 30 1935
Portland
Oregon
The Bank of California, N. A."

"Collection
Sep 30 1935
Department" [18]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [19]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count Five:

That Joe Mazurosky, the defendant above-named, prior to September 12, 1935, the exact date being to the Grand Jurors unknown, acting jointly with Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, together with other persons to the Grand Jurors unknown, did

devise a certain artifice and scheme to defraud and, by means of false and fraudulent pretenses, representations and promises, to obtain money and property from a certain class of persons, including one E. C. Deibert, then resident in divers communities within the United States, who, by reason of age or infirmities and a lack of knowledge and experience concerning medical and surgical practice, could be induced to give credulity to the false representations herein described; that said scheme and artifice and pretenses, representations and promises were identical with those described in Count Two of this indictment and the allegations of Count Two descriptive of said scheme and artifice and pretenses, representataions and promises, and the falsity thereof, are hereby referred to and by reference incorporated herein as if here repeated;

That thereafter, and on or about the 7th day of December, 1935, the exact date being to the Grand Jurors unknown, the said false and fraudulent pretenses, representations and promises having been made to the said E. C. Deibert, and the defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., having secured from the said E. C. Deibert, by means of said false and fraudulent promises and representations a check in the sum of $300.00, and while said scheme and artifice was still in effect, the said defendant, Joe Mazurosky, for the purpose of executing said scheme and artifice to defraud and to obtain money and property from the said E. C. Deibert, did, at Port-

land, [20] in the State and District of Oregon, and within the jurisdiction of this Court, unlawfully, knowingly, wilfully and feloniously place and cause to be placed in the United States Post Office at Portland, Oregon, to be sent and delivered by the Post Office Establishment of the United States according to the address and direction thereon, a letter enclosed in a postpaid envelope, addressed to the Federal Reserve Bank at Spokane, Washington, from the Federal Reserve Bank at Portland, Oregon, a further description of said letter being to the Grand Jurors unknown, but which said letter contained a check which was in words and figures as follows, to-wit:

"Picture of Eagle
District No. 12
Member Federal
Reserve System

Farmers & Merchants Bank 98-186

Rockford, Wash. Dec. 6 1935 No.

Pay to Order of F. C. Adams $300.00

Three Hundred and no/100 Dollars

E. C. DEIBERT

N.P.
24-8

(Reverse Side)

(Stamps)

"Pay to the Order of any Bank or Banker or through the Portland Clearing House

All prior endorsements guaranteed

Dec. 7, 1935

24-1 Portland Branch 24-1

Federal Reserve Bank of San Francisco"

"Pay to the Order of any Bank or Banker or through the Portland Clearing House

All prior endorsements guaranteed

Dec. 9, 1935

28-1 Spokane Branch 28-1

Federal Reserve Bank of San Francisco"

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [21]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count Six:

That Joe Mazurosky, the defendant above-named, prior to September 12, 1935, the exact date being to the Grand Jurors unknown, acting jointly with Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, together with other persons to the Grand Jurors unknown, did

devise a certain artifice and scheme to defraud and, by means of false and fraudulent pretenses, representations and promises, to obtain money and property from a certain class of persons, including one E. C. Deibert, then resident in divers communities within the United States, who, by reason of age or infirmities and a lack of knowledge and experience concerning medical and surgical practice, could be induced to give credulity to the false representations herein described; that said scheme and artifice and pretenses, representations and promises were identical with those described in Count Two of this indictment and the allegations of Count Two descriptive of said scheme and artifice and pretenses, representations and promises, and the falsity thereof, are hereby referred to and by reference incorporated herein as if here repeated;

That thereafter, and on or about the 7th day of December, 1935, the exact date being to the Grand Jurors unknown, the said false and fraudulent pretenses, representations and promises having been made to the said E. C. Deibert, and the defendant and the said Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., having secured from the said E. C. Deibert, by means of said false and fraudulent promises and representations a check in the sum of $300.00, and while said scheme and artifice was still in effect, the said defendant, Joe Mazurosky, for the purpose of executing said scheme and artifice to defraud and to obtain money and property from the said E. C. Deibert, did

unlawfully, [22] knowingly, wilfully and feloniously place and cause to be placed in the United States Post Office at Rockford, Washington, and sent and delivered to the addressee thereof by the Post Office Establishment of the United States, according to the address and direction thereon, a letter enclosed in a postpaid envelope, addressed to the First National Bank of Portland, Oregon, at Portland, in the State and District of Oregon, from the Farmers & Merchants Bank, Rockford, Washington, a further description of said letter being to the Grand Jurors unknown, but which said letter contained a check which was in words and figures as follows, to-wit:

"(Picture of Eagle)"

District No. 12 Member Federal Reserve System

"Farmers & Merchants Bank 98-186

Rockford, Wash. Dec. 6 1935 No.

Pay to the Order of F. C. Adams $300.00

Three Hundred and no/100 Dollars

E. C. DEIBERT"

N. P.

24-8

(Across Face) "Payment Stopped 12/10/35"

(Reverse Side)

(Stamps)

"Pay to the Order of any Bank or Banker or through the Portland Clearing House

All prior endorsements guaranteed

Dec. 7 1935
24-1 Portland Branch 24-1
Federal Reserve Bank of San Francisco"

"Pay to the Order of any Bank or Banker or through the Portland Clearing House

All prior endorsements guaranteed
Dec. 9, 1935
28-1 Spokane Branch 28-1
Federal Reserve Bank of San Francisco"

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [23]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count Seven:

That prior to the 12th day of September, 1934, and continuously thereafter to and including the 27th day of October, 1937, the exact dates being to the Grand Jurors unknown, in the State and District of Oregon, and within the jurisdiction of this Court, and at divers other places to the Grand Jurors unknown, the defendant, Joe Mazurosky, did then and there wilfully, unlawfully, knowingly and feloniously conspire, combine, confederate and agree with Roy L. Martin, alias Dr. Miles, alias O. C. Stone; Herbert C. Crangle, alias Dr. Avery; John M. Gray, alias Dr. Pierce, alias H. J. Pierce;

Thomas A. Andrews, alias Judge Thomas, and with divers other persons to the Grand Jurors unknown, to commit certain offenses against the United States of America, to-wit: to use the United States Mails to defraud in violation of Section 338, Title 18, U. S. C. A., and among the said violations to commit the divers offenses charged against said defendant in Count One of this indictment, the allegations of which count descriptive of the fraudulent scheme and artifice and the pretenses, representations and promises, and the uses of the United States Mails in furtherance of said scheme and artifice after it had been devised, are hereby referred to and by reference incorporated in this count as if here repeated, and each and all of said acts of the defendant and of said co-conspirators, so described in said count of this indictment are now here designated as overt acts of the said defendant and said co-conspirators, done in pursuance of and to effect the objects of said conspiracy;

That, in addition thereto, for the purpose of executing said unlawful conspiracy, and to effect the objects thereof, and also to effect the objects of said conspiracy between the defendant and said co-conspirators to commit other like offenses, while said unlawful com- [24] bination and conspiracy was in existence, defendant and certain of said co-conspirators, at the several times and places in that behalf hereinafter mentioned, did and caused to be done the following described separate overt acts, to-wit:

(1) On or about September 12, 1934, the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and the said Thomas A. Andrews, alias Judge Thomas, drove to the home of Clara E. Allen, at Longmont, Colorado, where the said John M. Gray represented himself to be Dr. Miles, a cancer specialist;

(2) On or about September 12, 1934, the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and the said Thomas A. Andrews, alias Judge Thomas, obtained from the said Clara E. Allen a cashier's check in the sum of $500, on the Mercantile Bank and Trust Company, Boulder, Colorado;

(3) On or about September 27, 1934, the defendant, Joe Mazurosky, presented said check to the United States National Bank at Portland, Oregon, for collection;

(4) On or about the 29th day of October, 1934, the said John M. Gray, alias Dr. Pierce, alias H. J. Pierce, and the said Thomas A. Andrews, alias Judge Thomas, called at the home of Christine M. Mershon at McMurray, Washington;

(5) On or about the 30th day of October, 1934, the defendant, Joe Mazurosky, tendered to the Bank of California, N. A., at Portland, Oregon, for deposit, a certain check in the amount of $450, signed by Christine M. Mershon, directed to the Arlington State Bank, of Arlington, Washington;

That at all times during the existence of said conspiracy it was the intention of defendant and said co-conspirators that the United States Mails should and would be used to effect the objects of said con-

spiracy; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [25]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

Count Eight:

That prior to the 12th day of September, 1934, and continuously thereafter to and including the 27th day of October, 1937, the exact date being to the Grand Jurors unknown, in the State and District of Oregon, and within the jurisdiction of this court, and at divers other places to the Grand Jurors unknown, the defendant, Joe Mazurosky, did then and there wilfully, unlawfully, knowingly and feloniously conspire, combine, confederate and agree with Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, and with divers other persons to the Grand Jurors unknown, to commit certain offenses against the United States of America, to-wit: to use the United States Mails to defraud in violation of Section 338, Title 18, U. S. C. A., and among the said violations to commit the divers offenses charged against said defendant in Counts Two, Three, Four, Five and Six of this indictment, the allegations of which counts descriptive of the fraudulent scheme and artifice, and the pretenses, representations and promises and the uses of the United States Mails in furtherance of said scheme and artifice after it had been devised, are hereby referred to and by reference incorporated in this count as if here repeated, and each

and all of said acts of the defendant and of said co-conspirators, so described in said counts of this indictment are now here designated as overt acts of the said defendant and said co-conspirators, done in pursuance of and to effect the objects of said conspiracy;

That, in addition thereto, for the purpose of executing said unlawful conspiracy, and to effect the objects thereof, and also to effect the objects of said conspiracy between the defendant and said co-conspirators to commit other like offenses, while said unlawful combination and conspiracy was in existence, defendant and certain of said co-conspirators, at the several times and places in that behalf hereinafter mentioned, did and caused to be done the following described separate overt acts, to-wit: [26]

(1) On or about the 12th day of September, 1935, Frank Faircloth, alias Dr. Pierce, and William H. Londergan, Jr., alias J. C. Adams, went to the home of H. F. Belter, near Kennewick, Washington, and pretended to perform an operation on the eye of H. F. Belter;

(2) On or about the 20th day of September, 1935, defendant, Joe Mazurosky, went to the Bank of California, N. A., at Portland, Oregon, and tendered for deposit and deposited a certain check drawn upon the First National Bank of Kennewick, Washington, dated September 20, 1935, signed by H. F. Belter;

(3) On or about September 27, 1935, defendant, Joe Mazurosky, went to the Bank of California,

N. A., at Portland, Oregon, and directed said bank to hold a check of H. F. Belter on the First National Bank of Kennewick, Washington, for a few days and re-present the same to the First National Bank of Kennewick, Washington, for payment;

(4) On or about the 6th day of December, 1935, defendant, Joe Mazurosky, went to the First National Bank of Portland, Oregon, and tendered for payment a certain check drawn upon the Farmers and Merchants Bank, Rockford, Washington, dated December 6, 1935, in the sum of $300, signed by E. C. Deibert;

That at all times during the existence of said conspiracy it was the intention of defendant and said co-conspirators that the United States Mails should and would be used to effect the objects of said conspiracy; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A true bill.

Dated at Portland, Oregon, this 8th day of February, 1938.

KENNETH S. REED
Foreman, United States Grand Jury
CARL C. DONAUGH
United States Attorney
J. MASON DILLARD
Assistant United States Attorney

[Endorsed]: A true bill.
KENNETH S. REED
Foreman.

[Endorsed]: Filed Feb. 8, 1938. [27]

And afterwards, to-wit, on Friday, the 25th day of February, 1938, the same being the 96th Judicial day of the Regular November 1937 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to-wit: [28]

[Title of Cause.]

February 25, 1938.

Indictment: Sections 388 and 88, Title 18, United States Code.

Now at this day comes the plaintiff by Mr. J. Mason Dillard, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Edward Butler, of counsel. Whereupon the said defendant is duly arraigned upon the indictment herein, and for plea thereto, says that he is not guilty. [29]

And afterwards, to-wit, on Friday, the 18th day of March, 1938, the same being the 2nd Judicial day of the Special Medford 1938 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to-wit: [30]

[Title of Cause.]

March 18, 1938.

Indictment: Sections 338 and 88, Title 18, United States Code.

Now at this day comes the plaintiff by Mr. J. Mason Dillard and Mr. Manley B. Strayer, Assistant United States Attorneys, and the defendant above named in his own proper person and by Mr. Hugh L. Biggs and Mr. Pat J. Gallagher, of counsel. Whereupon the jurors impaneled herein being present, the further trial of this cause is resumed. The said jury having heard the evidence adduced, at the close of all the evidence, plaintiff and defendant each having rested its case, the defendant moves the court to instruct the jury to return a verdict of not guilty and the court having heard the arguments of counsel, and the hour of adjournment having arrived, the further trial of this cause is continued to tomorrow, Saturday, March 19, 1938, at nine o'clock A. M. [31]

And afterwards, to wit, on Saturday, the 19th day of March, 1938, the same being the 3rd Judicial day of the Special Medford 1938 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [32]

[Title of Cause.]

March 19, 1938.

Indictment: Sections 338 and 88, Title 18, United States Code.

Now at this day comes the plaintiff by Mr. J. Mason Dillard and Mr. Manley B. Strayer, As-

sistant United States Attorneys, and the defendant above named in his own proper person and by Mr. Hugh L. Biggs and Mr. Pat J. Gallagher, of counsel. Whereupon the jurors impanelled herein being present, the further trial of this cause is resumed. Whereupon the court having fully considered the motion of the defendant for a directed verdict of not guilty, and being fully advised in the premises,

It is ordered that said motion be and the same is hereby denied as to Counts Four, Seven and Eight of the indictment, and

It is ordered that said motion be and it is hereby allowed as to Counts One, Two, Three, Five and Six of the indictment, and that the jury return a verdict of not guilty as to each of said Counts of the indictment.

The said jury having heard the arguments of counsel and the instructions of the court, retires in charge of proper sworn officers to consider of its verdict. Whereupon this cause having been finally submitted to the jury,

It is ordered that Earl T. Newbry, heretofore sworn as an alternate juror, be discharged from further service herein.

Thereafter, plaintiff being present by Mr. J. Mason Dillard and Mr. Manley B. Strayer, Assistant United States Attorneys, and the defendant in his proper person and by Mr. Hugh L. Biggs and Mr. Pat J. Gallagher, of counsel, said jury comes into court and returns its verdicts in words and figures as follows, to wit:

"We, the Jury duly impaneled and sworn to try the above-entitled cause, by direction of the Court do find the defendant, Joe Mazurosky,

Not Guilty as charged in Count One of the Indictment herein; [33]

Not Guilty as charged in Count Two of the Indictment herein;

Not Guilty as charged in Count Three of the Indictment herein;

Not Guilty as charged in Count Five of the Indictment herein; and

Not Guilty as charged in Count Six of the Indictment herein.

Dated at Medford, Oregon, this 19th day of March, 1938.

ELBERT L. LENOX
Foreman"

"We, the Jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, Joe Mazurosky,

Guilty as charged in Count Four of the Indictment herein;

Guilty as charged in Count Seven of the Indictment herein; and

Guilty as charged in Count Eight of the Indictment herein.

Dated at Medford, Oregon, this 19th day of March, 1938.

ELBERT L. LENOX
Foreman"

and it is ordered that said verdicts be received and filed and that the jury be discharged from further consideration of this cause. Whereupon upon motion of plaintiff,

It is ordered that it be and is hereby allowed to withdraw all exhibits introduced upon the trial of this cause and substitute photostatic copies therefor. [34]

And afterwards, to wit, on the 19th day of March, 1938, there was duly filed in said Court, a Verdict in words and figures as follows, to wit: [35]

[Title of District Court and Cause.]

VERDICT

We, the Jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, Joe Mazurosky,

Guilty as charged in Count Four of the Indictment herein;

Guilty as charged in Count Seven of the Indictment herein; and

Guilty as charged in Count Eight of the Indictment herein.

Dated at Medford, Oregon, this 19th day of March, 1938.

ELBERT L. LENOX
Foreman

[Endorsed]: Filed March 19, 1938. [36]

And afterwards, to wit, on Saturday, the 19th day of March, 1938, the same being the 3rd Judicial day of the Special Medford 1938 Term of said Court; present the Honorable ....., United States District Judge, presiding, the following proceedings were had in said cause, to wit: [37]

In the District Court of the United States
for the District of Oregon

Indictment

Sections 338 and 88, Title 18, U. S. C. A.

No. C-15297 March 19, 1938.

THE UNITED STATES OF AMERICA,

vs.

JOE MAZUROSKY,

Defendant.

JUDGMENT

Now at this day comes the plaintiff by Mr. J. Mason Dillard and Mr. M. B. Strayer, Assistant United States Attorneys, and the defendant above named in his own proper person and by Mr. Hugh L. Biggs and Mr. Pat Gallagher, of counsel; and the defendant having heretofore been convicted by the verdict of a jury in this court and cause of the crime of unlawfully using the United States Mails in furtherance of a scheme to defraud, as charged in Count Four of the indictment herein, and unlawfully conspiring to use the United States Mails

in furtherance of a scheme to defraud, as charged in Count Seven of the indictment herein, and unlawfully conspiring to use the United States Mails in furtherance of a scheme to defraud, as charged in Count Eight of the indictment herein, as appears of record herein; and said defendant waiving time and consenting that sentence may be imposed at this time,

It is adjudged that the said defendant do pay a fine of One Thousand Dollars and be imprisoned for a term of Five Years and from and after the expiration of said term until said fine be paid for the offense charged in Count Four of the indictment, and that said defendant do pay a fine of Five Thousand Dollars and be imprisoned for a term of Two Years and from and after the expiration of said term until said fine be paid for the offense charged in Count Seven of the indictment, and that said defendant do pay a fine of Five Thousand Dollars and be imprisoned for a term of Two Years and from and after the expiration of said term until said fine be paid for the offense charged in Count Eight of the indictment herein; that the terms of imprisonment imposed for the offenses charged in Counts Seven and Eight of the indictment run concurrently and begin to run upon the termination of the sentence imposed for the offense charged in Count Four of the indictment herein. A total sentence of Eleven Thousand Dollars fine and seven years; that said sentence of imprisonment be executed in a United States Penitentiary

to be designated by the Attorney General of the United States or his authorized representative, and that said defendant stand committed until this sentence be performed or until he be otherwise discharged according to law.

JAMES ALGER FEE
Judge

[Endorsed]: Filed March 19, 1938. [38]

And afterwards, to wit, on Tuesday, the 19th day of April, 1938, the same being the 37th Judicial day of the Regular March 1938 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [39]

[Title of District Court and Cause.]

ORDER ALLOWING TIME FOR FILING BILL OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

At this time this matter coming on to be heard on the motion of Defendant and Appellant herein, appearing by and through his attorney, Edwin D. Hicks, for an order extending the time in which to file bill of exceptions and assignments of error in the within appeal until and including the first day of May, 1938, and it appearing from said motion that good cause has been shown for the allowance of such extension of time in which to file bill of exceptions and assignments of error

herein and the Court being fully informed in the premises:

It is ordered that the Defendant and Appellant have and he is hereby granted until and including the first day of May, 1938, in which to file bill of exceptions and assignments of error in respect of the appeal which has heretofore been taken in this cause.

Dated this 19th day of April, 1938.

JAMES ALGER FEE
Judge of the District Court

[Endorsed]: Filed April 19, 1938. [40]

And afterwards, to wit, on the 28th day of April, 1938, there was duly filed in said Court, a Stipulation for Transcript of Record in words and figures as follows, to wit: [41]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties to the within cause, through their attorneys of record, that the transcript to be prepared by the Clerk of the Court and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit shall consist of the following:

(1) Indictment;

(2) Record of Arraignment and Plea;

(3) Record of Trial Containing Motion for Directed Verdict;
(4) Record of Verdict;
(5) Verdict of Guilty;
(6) Sentence and Judgment;
(7) Notice of Appeal;
(8) Order Extending Time in which to file Bill of Exceptions and Assignment of Errors;
(9) Bill of Exceptions;
(10) Assignment of Errors;
(11) Stipulation as to Record.

Praecipe for Record to be prepared by the Clerk under Rule Nine of the Rules of the Supreme Court of the United States governing Appeals in criminal cases.

M. B. STRAYER
Assistant United States Attorney
for the District of Oregon
EDWIN D. HICKS
Attorney for Defendant and Appellant

[Endorsed]: Filed April 28, 1938. [42]

And afterwards, to wit, on the 28th day of April, 1938, there was duly filed in said Court, a Praecipe for transcript of the record on appeal, in words and figures as follows, to wit: [43]

[Title of District Court and Cause.]

PRAECIPE

To: Hon. G. H. Marsh, the Clerk of the United States Court:

You are hereby directed to please prepare and certify the record in the above entitled cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above entitled cause which are pertinent to the Appeal, and especially including therein the following documents:

(1) Indictment;
(2) Record of Arraignment and Plea;
(3) Record of Trial containing Motion for Directed Verdict;
(4) Record of Verdict;
(5) Verdict of Guilty;
(6) Sentence and Judgment;
(7) Notice of Appeal;
(8) Order Extending Time in which to file Bill of Exceptions and Assignments of Error;
(9) Bill of Exceptions;
(10) Assignments of Error;
(11) Stipulation as to Record;
(12) This Praecipe,

omitting titles, verifications, and acceptance of service on all said documents except the Indictment and the Notice of Appeal. [44]

Dated at Portland, Oregon, this 28th day of April, 1938.

EDWIN D. HICKS
Attorney for Defendant and Appellant

[Endorsed]: Filed April 28, 1938. [45]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 45, inclusive, contain a transcript of the matters of record in said court pertinent to the appeal from a judgment and sentence in a certain criminal cause then pending in said court numbered C-15297, in which the United States of America is plaintiff and appellee, and Joe Mazurosky is defendant and appellant, as designated by the stipulation and praecipe for transcript filed in said cause by said appellant; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause as designated by the said stipulation and praecipe, as the same appears of record at my office and in my custody.

I further certify that the cost of the foregoing transcript is $15.90, and that the same has been paid by said appellant.

I further certify that there is transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, with the foregoing transcript, the original bill of exceptions and the original assignment of errors filed in said cause by said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 29th day of April, 1938.

[Seal] G. H. MARSH,
Clerk. [46]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered, that the above entitled cause came on regularly for trial Thursday, March 17, 1938, at 9:00 o'clock A. M., in the above entitled court, at Medford, Oregon, before the Honorable James Alger Fee, Judge, presiding, and a jury of twelve men, duly and regularly empanelled and sworn, the United States of America appearing by its attorneys, Messrs. J. Mason Dillard and Manley Strayer, Assistant United States Attorneys, and defendant appearing by his attorneys, Messrs. Hugh L. Biggs and P. J. Gallagher.

Whereupon the following proceedings were had:

C. B. WELTER

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

(Testimony of C. B. Welter.)

Direct Examination

By Mr. Dillard:

My name is C. B. Welter. I am a postoffice inspector of the United States Government and have served in such capacity for thirty-one years. I am acquainted with and have had conversation with the defendant, and am familiar with his signature.

(At this point Government's exhibits, numbered 1, 3, 4, 5, and 7 were marked for identification and were identified as each bearing the endorsement "Joe Mazurosky" (defendant) on the back thereof.)

FRANK NELSON

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows: [49]

Direct Examination

By Mr. Dillard:

My name is Frank Nelson and I reside at this time at the House of Correction, Milwaukee, Wisconsin. I have examined government's exhibit "4" for identification, being a check drawn by "H. F. Belter" and state that I first saw this check in the fall of 1935. At that time my partner, Mr. Londergan, and I called at Mr. Belter's home in the vicinity of Rockford, Washington. Mr. Londergan had information about him.

(Testimony of Frank Nelson.)

I have known the defendant Joe Mazurosky about nineteen or twenty years, I should judge. I met him either during or shortly after the world war. I was in the army but the defendant was not in the army at that time. I met the defendant through a mutual friend, Dr. Brown, who had an optical store next to his place of business. I saw the defendant quite frequently after that time, either at his place of business, in Portland, Oregon, or at the optical store. We used to visit back and forth. We played cards some. We have been good friends since that time as far as I was concerned.

Q. Did it continue up until 1935, would you say?

A. Yes, sir.

I have examined Government's exhibit No. 7 for identification, which you have handed me, and state that I first saw the exhibit in either 1925 or 1926; I don't remember the exact date or year. Henry Wagner was the maker of the check. I had just known Mr. Wagner a few hours when that check was made out.

Referring back to the other check, exhibit 4 for identification, I will state that I received Four Hundred ($400.00) Dollars as the proceeds of that check. I received the money from Mr. Mazurosky a month or six weeks after the date of the check. I was in Spokane, Washington, at the time and received the check [50] through the mail. The letter enclosing the check was addressed "Frank W.

(Testimony of Frank Nelson.)

Nelson'' to my Spokane address. My endorsement does not appear on the back of the check. It does bear the endorsement of my partner, Mr. Londergan, who was then going under the name of J. C. Adams.

Q. How did you happen to receive the proceeds of that check from Joe Mazurosky?

A. Well, I sent him this check.

Q. How did you send it to him?

A. By mail.

I sent the check to the defendant's address in Portland, Oregon. It was a Five Hundred ($500.00) Dollar check and I received back Four Hundred ($400.00) Dollars. I owed Mr. Mazurosky Twenty ($20.00) Dollars and I gave him Fifty ($50.00) Dollars for cashing the check and told him to keep Thirty ($30.00) Dollars for interest on what I owe him.

Mr. Dillard: Q. I will ask you, Mr. Nelson, if you ever had a conversation with Joe Mazurosky, the defendant, relative to the cashing of checks that might be sent to him by you.

A. Well, I really couldn't say that I did have any understanding.

Q. Did you ever talk with Joe Mazurosky, the defendant, about a commission for cashing this check or other checks of a similar character?

Mr. Biggs: That is leading and suggestive, if the Court please.

The Court: Overruled.

(Testimony of Frank Nelson.)

Mr. Biggs: An exception that must be taken after each ruling.

A. Well, there was only one time to my knowledge; the defendant told me that ten (10%) per cent wasn't enough, he would have to have more money than that. [51]

Mr. Dillard: Q. About when was that?

A. That was in '35.

Q. At that time did he say any more than that, that ten (10%) per cent wasn't enough?

Mr. Biggs: That is leading and suggestive, if the Court please. I see no reason why this witness can't state the conversation without having the words put in his mouth.

The Court: Overruled.

A. He just said that the checks were getting a little hot and he would have to have more commission.

Mr. Dillard: Q. Now I will refer you to the other check you have in your hand, Exhibit 7 for identification, bearing the signature of the maker, Wagner. I will ask you if you ever had a conversation with Joe Mazurosky about that check.

A. Well, there was a Thousand ($1,000.00) Dollars given to Mazurosky. The check came back; the signature wasn't satisfactory—— I left that part of the country at the time and didn't return for three or four years, and upon my return to Portland I casually asked Joe if it really cost a thousand dollars to square that check and he said, "Well, you still owe me money."

(Testimony of Frank Nelson.)

Q. What did Joe Mazurosky say, if anything?

A. He merely said, "You still owe me money."

I was present when the check was signed by Mr. Wagner. It was delivered to me.

Q. How did Mr. Wagner happen to give you a check for Five Hundred ($500.00) Dollars?

A. I called on Mr. Wagner at his home——

Mr. Biggs: Just a moment, the defendant objects to the introduction of any testimony concerning the manner or means or time or place of the taking of that check. It is not shown to be set up in the indictment. It is not the basis for one of the charges made in the indictment; it is dated, as already identified, some [52] thirteen years prior to the indictment and some nine years prior to the date the alleged conspiracy commenced, and therefore is too remote to be admitted under the theory of any similar transactions, if that is what is claimed for it.

Mr. Dillard: It is offered, your Honor, to show knowledge on the part of the defendant. It will develop that—well, it is offered to show knowledge.

The Court: Let me see those two checks. You are now asking about Exhibit No. 7?

Mr. Dillard: Yes, your Honor.

The Court: I think that sufficient basis is not laid so that evidence can be introduced as to check No. 4.

Mr. Dillard: I will refer you back then, Mr. Nelson, to Exhibit 4, the Belter check. Was that check ever in your possession?

(Testimony of Frank Nelson.)

A. It was.

Q. And will you tell how it happened to come into your possession?

Mr. Biggs: If the Court please, for the purpose of the record I enter my objection to that, the original objection that was made to that testimony. I understand the Court hasn't ruled on it.

The Court: Yes, the Court has ruled that a sufficient basis has been laid so that the transaction by which this check was obtained is admissible.

Mr. Biggs: And an exception.

The Court: An exception is allowed.

My partner, Mr. Londergan, and I called on Mr. Belter at his home and I was introduced to Mr. Belter by Mr. Londergan as an eye, ear, nose and throat specialist from Buffalo, N. Y., and I [53] told him that he had a very serious condition of the eye and he should go in and call on an oculist and have his eye treated, and he asked me if I could do the work for him there at home and I consented to do the work for him in his home and received in exchange Three Hundred ($300.00) Dollars in cash and a check for Five Hundred ($500.00) Dollars, this check. Mr. Belter's home was located in the country out of Kennewick, Washington, two or three miles out. Mr. Belter was a man around seventy years old. I was only at his home possibly an hour altogether.

(Testimony of Frank Nelson.)

I was not at that time an eye doctor; I am an optometrist by profession. I was not an eye specialist. At the time I went by the alias name of Dr. Pierce. My partner was representing himself as Dr. Adams.

I explained to Mr. Belter that he had a very serious eye trouble and I used a piece of fish skin that I put in his eye, and used Murine; I told him it was radium, and I think his wife or his sister was there at the time, and I took this piece of skin out of his eye and told him it was a cancerous cataract.

Mr. Dillard: Q. What information did you have at the time that you received that check from Mr. Belter as to how or when it would be paid by the bank on which it was drawn?

A. We went to the bank and he only had Three Hundred ($300.00) Dollars in cash in the bank and he was unable to get the money that day, the balance of Five Hundred ($500.00) Dollars more, so he made arrangements with the bank to get the money the next day and he gave us a check and told us to present it to the bank possibly a week or ten days later and the money would be paid.

Q. I will ask you if you conveyed that information to Joe Mazurosky?

A. I don't remember exactly. [54]

Mr. Dillard: Now I am going to refer you back again to Exhibit 7, being a check signed by Mr. Wagner.

(Testimony of Frank Nelson.)

Mr. Biggs: If the Court please, would it be proper at this time for the defense to ask the Government to advise the defense on what date the alleged conspiracy set up in the indictment commenced? I think it may have some bearing on the admissibility of this testimony. The indictment is indefinite on that point.

Mr. Strayer: All we can say on that is, we have alleged all we could in the indictment. We have alleged it originated prior to 1934. How far back it extended we don't know. We think there is evidence that it extended clear back into 1925, but that is all the information we can furnish counsel.

Mr. Biggs: If they are not ready to claim the conspiracy did start at that time that would be an additional ground of objection to Government's Exhibit 7, Your Honor.

The Court: The Court will admit the testimony in view of the matters that have been already testified regarding Government's Exhibit 7.

Mr. Biggs: May we have an exception to the Court's ruling?

The Court: Yes.

It was in 1931 that I had the conversation with Mazurosky regarding the Thousand ($1,000.00) Dollars.

I came into possession of the Wagner check, Exhibit 7, under the following circumstances. I called on Mr. Wagner at his home, introduced myself as a local optometrist from Vancouver, Washington, and examined his eyes and told him that he had a

(Testimony of Frank Nelson.)

trouble that I really didn't understand myself, that he should consult an eye, ear, nose and throat specialist, and I asked him if he knew anybody in Vancouver or Portland that he was personally [55] acquainted with that he cared to go see, and he said that he didn't, so I told him about a party that was with me that was an eye specialist and that if he would go out and ask him to come in that he might give what information he needed, so he did that. I told him my partner (Dr. Brown) was Dr. Ainsworth. He called Brown into the house and Brown performed an operation for him on his eye. At that time we were using the skin of an egg. He put that on the eye and removed it from the eye, and showed it to him and charged him Six Hundred Seventy-five ($675.00) Dollars, I think it was. We got two checks, one for One Hundred Seventy-Five ($175.00) Dollars and one for Five Hundred ($500.00) Dollars. The one for $175.00 Dr. Brown cashed at one of the banks in Vancouver, Washington. I took the other Wagner check to another bank and he refused to cash it, but the banker certified the check. I am referring now to Exhibit 7 for identification. When he refused to cash the check I gave it to my partner, Dr. Brown, and from that day until last year I never saw the check any more. Dr. Brown was a friend of Mr. Mazurosky as well as myself. He was the gentleman who had the store next door to Mazurosky's store, the optical store.

Mr. Dillard: Q. Did you ever discuss this plan or means that you have described here of obtaining

(Testimony of Frank Nelson.)

these checks from the Belters and the Wagners with Joe Mazurosky, or discuss it in his presence?

A. I don't really think we ever did discuss it.

I do not remember of having any conversation with him in that regard. I did not recover the proceeds of the Five Hundred ($500.00) Dollar Wagner check.

Mr. Dillard: Q. I will ask you if either you or this man Brown that you refer to ever discussed this system of obtaining money from people which you have described you used in the Wagner [56] instance. Did you ever discuss it in the presence of the defendant?

A. No, sir, I don't think that I ever discussed it with Mazurosky or with Brown before any of us together.

Referring to Government's Exhibit 5 for identification, the photograph of the Deibert check, I will state that I first saw that check some time in 1935 at Rockford, Washington, and I also saw it in Spokane, Washington. I received it from my partner, Mr. Londergan, in the presence of Mr. Deibert. I sent it through the mail to Mazurosky for collection. I know of my own knowledge the circumstances under which Mr. Londergan received the Deibert check.

Mr. Dillard: Q. Will you tell about it then?

Mr. Biggs: If the Court please, to keep the record straight, we object to the testimony—any testimony as to the statements of this witness or his partner identified here as Londergan in the absence and out

(Testimony of Frank Nelson.)

of the presence of the defendant, Joe Mazurosky.

The Court: The objection is overruled.

Mr. Biggs: An exception.

A. My partner, Londergan, under the name of J. D. Adams, and I called on Mr. Deibert at his home and I was introduced as Dr. Pierce and I performed the usual operation on the eye and charged Mr. Deibert Three Hundred ($300.00) Dollars. We went to the bank to get the money and he couldn't get the money so he gave us a post-dated check for Three Hundred ($300.00) Dollars. I didn't see the check written out. It was given to my partner and brought over to the car and Londergan gave me the check to send in for collection, which I did. I sent it from Spokane to Joe Mazurosky in Portland and never heard any more about it.

Mr. Dillard: Q. Now Mr. Nelson, you have told about sending the Belter check to Joe Mazurosky and the Deibert check to Joe [57] Mazurosky. I will ask you to state in your own words, why you sent those checks to Joe Mazurosky instead of taking them to some local bank to cash them and get the proceeds?

A. Well, I knew that the checks were to be handled through him.

Mr. Biggs: I object to that as a conclusion of the witness. It has no bearing on any of the issues of this case, what he knew, unless they lay some foundation for it.

The Court: I think it may remain.

(Testimony of Frank Nelson.)

Mr. Biggs: And an exception.

During the period from 1931 until 1935 I communicated with Joe Mazurosky in my true name. I sent the Deibert check to him in my true name of Frank Nelson.

Mr. Dillard: Q. I will ask you if you ever had a conversation with Joe Mazurosky, we will say between the years of 1929 and 1935, concerning the means by which you made your livelihood, made your living.

A. About the only thing that was ever said in regard to the business was, he asked me, "How are the suckers, Slats? Are you making any big sales?" That was about the only conversation we had.

He asked me that several times between 1929 and 1935.

I testified before that I owed Joe Mazurosky Twenty ($20.00) Dollars at the time I sent him the Belter check. I borrowed money from Mr. Mazurosky several different times. The amounts were usually small, ten or twenty dollars or something like that. I also bought merchandise from him, a watch and a few glasses—spectacles. The cost of all these items did not run over ten dollars. I think the watch cost five dollars. I don't remember the occasions when I borrowed money from Joe Mazurosky, the particular occasions. I borrowed so many different times from him, several dozen times, I guess, whenever I needed money. I [58] only borrowed the money from him in Portland. We took one trip together in 1931, the only trip I ever took

(Testimony of Frank Nelson.)

with him. We went some place in Washington; I don't remember where it was, I was pretty well under the influence of liquor and we stayed three or four days. I had a chauffeur at the time and we went in his car with other parties. Others who were in attendance went in their own car. It was a pleasure trip and I paid the expenses.

Cross-Examination

By Mr. Biggs:

Frank Nelson is my real name. I have used several different names, at different times and places. I am held in the House of Correction at Milwaukee under the name of Frank Faircloth. The House of Correction is something similar to a penal institution. I am under sentence for a period of four months on an indictment to which I pleaded guilty for attempted use of the mails to defraud. The fraud charge was resulted from the same kind of fraud with which we are here concerned.

Other occupations I have followed include the hotel and restaurant business. I followed this line in Spokane and Seattle, Washington. After leaving the army I entered the hotel business in Spokane, after leasing a hotel property. I operated this business for about four years, up until about 1925, and then I went into the eye business and have been in the eye racket since that time. From 1911 up to 1919, I sold magazines. By eye racket, I refer to the incidents I have just described. Since entering the eye business, I have likewise been in the hotel busi-

(Testimony of Frank Nelson.)

ness in Seattle, Washington, this for about a year along about 1929. In 1937, I was in the hotel business in San Francisco. Between 1929 and 1937 I was not in the hotel business, or other kind of business except the eye business. I occasionally do some gambling. I have never been interested in promoting oil ventures or anything of that kind, nor did I have an connection with the caravan business. [59] I studied optometry in Spokane for two years, 1923 and 1924, I think it was, and I maintained a business in Spokane the latter part of 1924. From there I quit the store and went into the eye racket business and have not had a store since. I am a registered optometrist but my certificate is delinquent; I think I let it run out.

Q. Isn't it a fact, Mr. Nelson, that during this time since 1925 you have been convicted of other types of offenses of the kind you have just described?

A. No sir.

Q. Obtaining money under false pretenses?

A. I was convicted on this racket one time at Rockford, Illinois, and that was in 1930.

I did not keep any record of the loans I made from the Defendant. A couple of different times I pledged security with him, a diamond stickpin, a watch, or something of that nature. I do not remember when these transactions occurred. Ordinarily I did not pledge any security nor give my note. Referring to the Belter check, Government's Exhibit

(Testimony of Frank Nelson.)

No. 4, I owed Mr. Mazurosky Twenty ($20.00) Dollars at the time that check was given.

Q. Do you recall on the trial before you said that you owed him Twenty-five ($25.00) Dollars?

A. I do not.

Q. But you kept no record?

A. No, sir.

On the trial of the case at Portland, this same case, I recall that I testified as follows: (impeaching question)

I have been convicted of a felony and this occurred in Wyoming, I can't think of the town. The conviction was for writing a check for Twenty ($20.00) Dollars. I wrote the check and served time for it.

My livelihood since 1925 has been derived largely from deceiving people. Deception is an art that I have commercialized and I [60] have capitalized on this for the last nine or ten years. I have developed a technique in deception that ordinarily enables me to deceive without arousing suspicion.

I do not recall a time when Mr. Mazurosky loaned me Ninety ($90.00) Dollars for payment of my hotel bill at the Heathman Hotel in Portland. I know that he never did pay a hotel bill for me at the Heathman Hotel.

Q. Or did you borrow money from him for that purpose?

A. Yes, sir.

Referring to the Belter Check, the Five Hundred ($500.00) Dollar check from which I testified I re-

(Testimony of H. F. Belter.)

that there has been no sufficient foundation to show that this defendant had anything to do with it.

The Court: The objection is overruled.

Mr. Biggs: An exception.

Q. I wish you would go ahead and tell us how you happened to make out that check payable to that Mr. Adams?

Well, one of the two parties was represented to me as Dr. Miles. Adams examined my eyes and said, "You have got a cataract [62] on your eye; that is the trouble with your sickness." This occurred right in my home. They said they were doctors and that they could cure me. When Adams came in he had a glass that he put on my eyes and tested them. My right eye was all right and my left eye wasn't, so he says, "I have got a doctor in the car here; his name is Miles, and he can take that cataract off of your eye and you will be all right," so I thought it was better having it taken off as being sick all the time. So they went at it. They put a towel over my eye and they had a dropper and they put stuff in my eye, dripped it in there. He took something out of my eye, I don't know what. I saw it and it looked like white skin.

I paid them Three Hundred ($300) Dollars cash and they took me to Kennewick in their car and I went to the bank and asked the president about the money. The banker told me I would have to wait eight or ten days for the money; this was on the 12th of September. After the twentieth they got their money because the check came back to the bank and

(Testimony of H. F. Belter.)

I got it out of the bank. They remained in their car while I went in the bank. I told them that the check would be good in a few days. I have seen both of these men since on a photograph. I have seen one of them personally, and I am referring to that big, slim, tall fellow, black hair, dark in his face. The man I have just described was not known to me as Adams, but as Dr. Miles. Adams told me his name was Miles.

(No Cross Examination)

MRS. H. F. BELTER

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Questions by Mr. Dillard:

I am Mrs. H. F. Belter, the wife of the witness who has just testified. I have heretofore seen the Exhibit 4 for identification, the check, but did not see it at the time it was made out. He made it out at the bank. I was present when an operation was performed on my husband to remove a cataract or something from my husband's eye. There were two men there at the time the [63] operation was performed. I don't remember the names they used. Since that time, I have seen the one who is tall and black. The tall, dark man is here. I did not know these men by their names when they performed the operation.

(No Cross Examination)

HENRY WAGNER

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Questions by Mr. Strayer:

My name is Henry Wagner and I live eight miles east of Vancouver, Washington, on a farm. I have a brother, William Wagner, who lives with me. I will be seventy-five next month, about two weeks from now. I have examined the check, Exhibit 7, which you have handed me and will state that it bears my signature. The check is made payable to O. A. Plummer and I made it out on November 14, 1925.

Q. Mr. Wagner, will you just tell the jury the circumstances under which you made out and delivered that check?

Mr. Biggs: If the Court please, we object to the introduction of this testimony on the ground that it was to do with a transaction in the absence and not in the presence of this defendant, there being no sufficient foundation made connecting the defendant with the transaction or showing knowledge of the transaction.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Exception allowed.

Mr. Biggs: Could a continuing objection to this testimony go on, Your Honor, to prevent the necessity of constant interruption? [64]

The Court: You will have to object to the testimony of each witness.

(Testimony of Henry Wagner.)

Mr. Biggs: But it may be a continuing objection?

The Court: As far as the testimony of the particular witness.

Mr. Biggs: Thank you.

There were two men came to my farm on the 14th day of November, 1925, who said they were eye doctors that tried to sell us glasses. I wasn't in need of any glasses, but my brother, William, did need them; his eyes were failing and they examined his eyes and discovered that there was something wrong and finally found it was a cataract—told him it was a cataract, and said that it would have to be removed or else he would go blind, and so he submitted to the operation to remove that imperfection in his eye. Before they did that I asked them what it would cost to remove it and they said it would be nominal, the price would be nominal, and so they went to work and removed it and when they got through the bill was Seven Hundred Fifty ($750.00) Dollars.

They had an instrument about a foot long, a sort of rod, and they worked around in his eye with that and removed something that looked like the white of an egg, and they called that the cataract. That was the operation that was performed. These parties were using the names of Dr. O. A. Plummer and Dr. J. C. Ainsworth. Mr. Plummer was a tall, slim man, rather dark, about 35 or 40 I should judge. I believe I saw him today. The other wasn't near as tall, was older, heavy set with a sloping forehead at a conspicuous angle. The older man performed the

(Testimony of Henry Wagner.)

operation. When they said they wanted $750.00 I objected. They said radium was used to remove the cataract and that the value [65] of the radium used in the operation was Six Hundred Fifty ($650.00) Dollars. They reduced the bill to Six Hundred Fifty ($650.00) Dollars and I wrote out two checks, this one and another for One Hundred Seventy-five ($175.00) Dollars, making a total of Six Hundred Seventy-five ($675.00) Dollars. The checks were handed over to Dr. Plummer. I did not see them after I delivered the checks. One of the checks was cashed, the $175.00 one. I next saw the $500.00 check at Mr. Dubois' in the Bank. After these men departed with the checks, I went over to Portland, Oregon, to question one Joe Mazurosky who presented the check for payment at Vancouver to find out the whereabouts of those two eye doctors, and Mr. Mazurosky told me them fellows were loggers and he had sold them a watch and merchandise to a certain amount and gave them the balance in money. That is the way he come to get this check. I don't think he had the check when I talked with him. I asked him where those fellows were that he had sold the watches to and he said he thought they were around Portland. He told me he knew one of them for a number of years. I don't remember which one of them it was he said he had known for a number of years. I talked with Mr. Mazurosky because I wanted to get on the trail of those eye doctors. Since he had the check, I thought he might know where they were. He said he didn't know

(Testimony of Henry Wagner.)

where they were but thought they might be around Portland. I don't know that he offered to aid me in finding them. I then went to the Deputy Sheriff at Vancouver and we went together to see John Goltz in Portland. About two weeks after that I talked with Mr. Mazurosky at his place of business and he told me it was too bad I had been swindled, and that he had been swindled too the same way. I don't know all that was said in the conversation. I believe we did discuss the matter in a general way for some time. I don't remember any details about his statement of being swindled. I [66] made no agreement with Mr. Mazurosky about what was to be done with the check, whether it was to be paid or not. The check has not been paid. About November 26th, 1925, about two or three weeks after the eye doctors were there, I went to Spokane to locate the eye doctors. I did not succeed in locating them. While in Spokane, on November 27, 1925, there was a person boarded the train just as it pulled out for Portland that looked very much like Joe Mazurosky. The operation on my brother's eye accomplished nothing.

Cross Examination

Questions by Mr. Biggs:

I am not sure that it was Mr. Mazurosky that I saw in Spokane. I just got a side glance of the party as he boarded the train. I did not make any investigation to determine if it were he. I would rather believe that it was not Mr. Mazurosky; that

(Testimony of Henry Wagner.)

I was mistaken. Mr. Mazurosky told me the men were loggers after I had come back from Spokane.

Q. When this case was on trial before Judge Fee in Portland in the Federal Court do you remember your testifying in response to this question: "Well, what did he tell you? Answer: He told me they were locals, that he had sold them merchandise to the extent of over one hundred dollars and paid them the balance in money."

A. Yes.

WILLIAM WAGNER

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Questions by Mr. Strayer:

My name is William Wagner, brother of Henry Wagner, and we live near Vancouver, Washington. I recognize the check you have handed me, Exhibit 7 for identification.

Q. Do you recall the circumstances under which that check was made out and delivered? [67]

A. Yes, sir.

Q. Will you just tell the jury about it?

Mr. Biggs: If the Court please, for the purpose of the record we object to the introduction of this testimony on the grounds assigned with respect to the testimony of the brother.

The Court: The objection is overruled.

(Testimony of William Wagner.)

Mr. Biggs: And that will go to all the testimony on the further ground of remoteness?

The Court: Overruled. Exception allowed.

Mr. Strayer: Q. Tell us the circumstances under which your brother made out and delivered that check.

Well, this check was written for eye doctors. There were a couple of them, Plummer and Ainsworth, and they examined our eyes and told me I had a cataract on one of my eyes and if it wasn't removed I would go blind in a short time. It scared me, of course, and it scared my brother, and we issued this check in payment for the operation. The check was made out by my brother in my presence. The check was delivered to Plummer. The check was never paid. I have seen neither of the men since then. The operation didn't help "one bit."

(No Cross Examination)

JOHN GOLTZ

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

Questions by Mr. Dillard:

My name is John Goltz and I am a city detective of Portland, Oregon. I have been connected with the Police Department for 34 years. I was serving as a detective during the years, 1925 and 1926. I know the defendant in this case and had occasion to talk

(Testimony of John Goltz.)

with him in the year 1925. On the morning of November 23, 1926, Deputy Sheriff Andrews of Vancouver and Mr. Henry Wagner came to [68] our office. The deputy sheriff informed me that he had a warrant for two men who represented themselves as doctors; one, O. A. Plummer and the other, J. C. Ainsworth, and that Mr. Mazurosky would know them so we drove to his place and interviewed him. He said, "Yes, I know them fellows", and we questioned him about a check. We asked him if he knew about a Five Hundred ($500.00) Dollar check and he said, "Yes, they bought One hundred six ($106.00) Dollars worth of jewelry from me and gave me the check and I gave them the balance in cash." Mr. Mazurosky gave us a description of the men. He described O. A. Plummer as a man about fifty years of age, rather heavy set, five foot eight tall, 180 or 190 pounds, thin gray hair, gray mustache, broad shouldered, forehead sloping back, wore a large diamond in his shirt. Mr. Mazurosky told us that O. A. Plummer goes to the logging camps, make the logging camps.

Cross Examination

By Mr. Biggs:

Mr. Mazurosky told us Plummer was a gambler and that he makes the logging camps. He gave us a description of Plummer and also of the other man known as Dr. Ainsworth. He described Plummer as a man about six feet one, 30 to 35 years old, slender built, and had hair, a pretty good set of hair, nose

(Testimony of John Goltz.)

rather long, hair rather thin. The description I have just given was gotten from Mr. Mazurosky and Wagner together. They were both together when the description was given me. I got both of the descriptions from Mr. Mazurosky. That was on the occasion of my first visit to him.

ERNEST C. DEIBERT

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

My name is E. C. Deibert and I live at Rockford, Washington. [69] The Exhibit 5 for identification which you have handed me bears my signature. After making out the check, I gave it to those eye doctors. I had Fifty ($50.00) Dollars in the bank and they wanted me to pay them right away and they thought I had the money in the house and they were squeezing me; they wouldn't go out of the house until I paid them. They made me go with them in a car to draw the money and pay them.

Q. How much did you draw?

A. I had this fifty dollars cash in the bank, and when they examined my eyes—I was on the job and the short fellow, the eye doctor—the car barely stopped and he was out of the car and running for me, and right away he says, "How is your eyes?" "Oh", I says, "they are fair." Of course I had——

(Testimony of Ernest C. Deibert.)

Mr. Biggs: If the witness will excuse me, if the court please, I want to put the same objection in the record as to this witness that has been put in as to the others, in that the defendant was not personally present and there is no testimony sufficient to connect him with it.

The Court: Objection overruled and exception allowed.

Mr. Dillard: Go ahead, Mr. Deibert.

He looked at my eyes right away and he told me I had poor eyes, and so he kept on talking and he wouldn't give me even a chance to answer him, he talked so fast. He wanted me to go with him in the house. I didn't care to go with him in the house, but finally he made me; I had to go with him in the house and then I had to sit down in a chair and he examined my eyes, and about three weeks before I had glasses fited to my eyes at Sears & Roebuck. He says he can cure my eyes. My wife asked him what he would charge. "Well", he said, "Examination is free", and then he says he has got Dr. Pierce in the auto and he can cure [70] them, and he called him in. He put his overcoat over my neck and my face, and then my wife says, "Let me see what you put in." "Oh, nobody can see that." Then he took something out of the eye. She wanted to see that but he wouldn't let her. "Well", he said, "I am going to charge you Three Hundred Fifty ($350.00) Dollars." My wife says, "I thought it was free." "Well, curing you ain't free." He said it would cost a whole lot more if I had to go to Seattle or Tacoma.

(Testimony of Ernest C. Deibert.)

I thought everything was honest, so we agreed and he took me to Rockford and I drew the Fifty ($50.00) Dollars and in addition I gave him a check for Three Hundred ($300.00) Dollars. A few days later, Mr. Goldman, of the bank, called me up inquiring to know where to send the Three Hundred ($300.00) Dollar check and my wife told him not to send it. The fellow that put the stuff in my eye gave his name as Dr. Pierce; said he had an institution in New York and one in Seattle or Tacoma. I saw the tall fellow at the Court House in Portland and that is the only time I have seen him since. I will be seventy-eight next May. I have always been a farmer. After executing the check I gave it to these eye doctors.

(No Cross Examination)

O. A. POWELL

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

My name is O. A. Powell. I am of the Portland Police Department and have been so identified for over 22 years. I have been a detective for over seventeen years. I was so employed during the year 1935. I have examined the Government Exhibit 5 for identification which you have handed me and state that I have seen a photograph of a check

(Testimony of O. A. Powell.)

which looked very similar to this one with the name of Deibert on it and in the amount of [71] Three Hundred ($300.00) Dollars. It was drawn on the same bank.

I know Joe Mazurosky and had a conversation with him about a check similar as to maker, amount, and date to the one you have just shown me. I think it was about the 20th of December, 1935. I was following up a letter that our office had received from the Sheriff at Spokane, Washington, I believe, and I went to Mr. Mazurosky's place of business and asked him about the check and about who this man Adams was to get him identified. Mr. Mazurosky said that he had known Adams in a way for about sixteen years but really didn't know his right name, but he was known as Slats, that he had been around Dr. Brown in that neighborhood years before and he knew him as Slats.

Q. Did he say to you what this man Slats' occupation was?

A. He said he was an eye specialist, is the way he described him.

We did not locate the man "Slats" at the time. Mr. Mazurosky was unable to tell us where he was or where he could be found. The check had been deposited at that time at the Bank of California and we were at the Bank and talked with the cashier before going down to talk with Mr. Mazurosky.

Q. Did Joe Mazurosky make any statement to you as to how the check hapened to come into his possession?

(Testimony of O. A. Powell.)

A. Well, I can't say on this particular check. I could say a statement generally made. He said those men often run a little account, maybe borrow a little money of him at times, but I wouldn't say on this particular check. I don't recall discussing with Mr. Mazurosky whether he received the check personally or through the mail.

(No Cross Examination)

W. E. WILLIAMS

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, [72] was examined and testified as follows:

By Mr. Dillard:

My name is Williams and I am a detective of the Portland Police force. I have been in the department about 22 years, and have been a detective for 16 years. I was serving as a detective in the year 1935. I had occasion to interview the defendant in company with Detective Powell. I have examined Government's Exhibit 5 for identification which you have handed me and state that I have seen a photograph of a check similar as to amount, date and name of drawer. We talked with Mr. Mazurosky about a check like the exhibit. Detective Manciet had a check and we were assigned to the case and we went and talked to the banker about the check, and from there we went down and talked to Mr. Mazurosky as to the description of the man who

(Testimony of W. E. Williams.)

gave it to him and everything like that. He said he didn't know the man's name; he had known him for about sixteen years. He was referring to the man whose name appeared on the check as "Adams". he said he came to the store and asked him to cash the check and he refused to do it; he said he would put it through the bank for him, and he didn't know whether it was any good until we told him it came back. He said they called the party "Slats" and he worked with Dr. Brown about sixteen years ago in the eye specialist bunk as far as he knew.

(Cross Examination)

By Mr. Biggs:

I made some notes of the conversation. I think I probably have them with me.

GLENN HARMS

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard: [73]

My name is Harms and I am Police Identification Officer and Photographer of the Portland Police Department. I was so employed in 1935. I have examined Government's Exhibit 5 for identification which you have handed me and state that it is the back and front of a check that I photographed on or about December 12th, 1935. The check was

(Testimony of Glenn Harms.)

brought to me by Detective Manciet of the check detail. I produced and have the original film of the check. (Produces original film.) The two films just handed you represent the front and back of the check.

(The two photographic films were thereupon marked Government's Exhibit 26 for Identification.)

The film and photograph turned out to be a correct representation of the original check. After photographing the check, I returned it to Mr. Manciet.

L. D. MANCIET

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

I am a detective of the Portland Police Department and was so engaged in 1935. I have examined Government's Exhibit 5 for identification, which you have handed me, and state that I had such a check as the photograph depicts in my possession. That was about December 10th and 11th, 1935. I obtained the check from the Bank of California, Portland, of which this is a facsimile. The original bore the same endorsements on the back at that time as it now bears. Thereafter, I took the check to Police headquarters and had it photographed by Fingerprint Expert Harms. I then returned the check to the Bank of California.

(No Cross Examination)

Mr. Dillard: If Your Honor please, we will offer in evidence Government's Exhibits for identification 4, 5, 7, and 26.

The Court: Any objection? [74]

Mr. Biggs: If the Court please, the defendant objects to the introduction of these checks on the ground and for the reason that there has been no evidence sufficient to connect the defendant with the manner and method and means by which these checks were taken or for any other purpose, and I assume they would be immaterial if they were not offered for the purpose of connecting the defendant with that transaction; as to Exhibit 7, on the further ground and for the further reason that it is in connection with a transaction occurring more than thirteen years prior to the date of the offer, and upon that ground it is too remote to have probative force.

The Court: All these checks have the defendant's signature and they are admissible in evidence. Admitted. Exception allowed.

(The documents heretofore marked Government's Exhibits 4, 5, 7, and 26, respectively, for Identification were thereupon received in evidence.)

HENRY WAGNER

was thereupon recalled as a witness in behalf of the United States, and, having been heretofore duly sworn, was examined and testified further as follows:

By Mr. Strayer:

When I testified on yesterday, I mentioned a conversation I had with Joe Mazurosky about the check I signed (November 14, 1925) and which was delivered by me to the man that performed the operation. When I talked with Mr. Mazurosky I told him the method that was employed; I told him about the operation.

(Cross Examination)

By Mr. Biggs:

I don't remember whether I told about this on the preceding trial.

LLOYD DUBOIS

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows: [75]

By Mr. Strayer:

My name is Lloyd Dubois and I reside at Vancouver, Washington. I am president of the Washington National Bank and have been its president since 1912. In 1925 and 1926 the bank was known as the Washington Exchange. I recognize the check you have handed me, Exhibit 7, signed by Henry Wagner. I first saw the check just about closing

(Testimony of Lloyd Dubois.)

time one Saturday, November 14, 1925. It was presented by a gentleman I didn't know. I questioned him about it, and it being a large check I didn't want to take any chance on it, and some of the answers that he gave me were not satisfactory, so I certified the check and told him he could deposit it in his own bank when he got home. The man left with the check. My certification thereon said, "Good for $500 when properly endorsed", signed by myself. It was probably a few days later the check came back to us, I think through the United States National which was our correspondent bank at that time. It was returned to us through the regular mail. It was sent through the regular collections. Upon receiving the check back, I stamped it "Payment stopped" and returned it. Payment had not been stopped until I stamped it so. I stopped payment on the check because on Monday morning when I came to the bank, I met Mr. Wagner and he told me the circumstances under which it was issued. It was brought over by Judge Stapleton and I told him I didn't think it was properly endorsed. That is what the certification demanded, and so he took it back with him. I told him they could bring the gentleman over if they had him over there and we thought we could properly identify him if it was properly endorsed, and so he took it back with him and later on he brought it back and gave it to us. Judge Stapleton brought it over just a few days after I had stopped payment on the check. Judge Stapleton was a practicing attorney in Portland at

(Testimony of Lloyd Dubois.)

that time. His purpose in coming to the bank was to demand payment on the check and he did so. The [76] check was never paid to Plummer or Mazurosky. It was finally paid to Mr. Wagner. After we got the check back we gave Mr. Wagner's account credit for it. Mr. Stapleton brought the check back and turned it over to us. I just rather gather from these endorsements that we must have had it twice before he brought it back. They evidently tried it again. I can't tell from the endorsements the dates that it came back to me through the mail. They are very badly blurred.

(Cross Examination)

By Mr. Biggs:

The Mr. Stapleton I referred to is now a Circuit Judge in Multnomah County, Oregon. I do not know, but I presume he was acting in behalf of Mr. Mazurosky at the time as his attorney. He asked me why I didn't pay the check. I had certified the check and then gave it back to this man Plummer. The effect of certifying a check by a bank is to give notice to whoever might take the check that the check is bonafide; that it is good.

JOHN M. GRAY

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Strayer:

My name is John Gray and my present place of residence is Texas Penitentiary. My age is thirty-six. I recognize the check you handed me, Exhibit No. 1 for identification. This check came into my possession about October 29, 1934. The check is made out in my handwriting and is signed by Mrs. Mershon, I believe. I received the check while at some little town above Arlington, Washington. There was with me at the time a Mr. T. A. Andrews who was working with me in the so-called eye racket. After receiving the check I brought it back to Seattle and I gave it to Roy Martin, an associate of mine in the eye racket. Martin had sent me to see the Mershons. Roy Martin went by the name of [77] Dr. Miles, and Pierce, and many other names, but he went this particular time under the name of R. E. Terrell.

After delivering the check to Martin, I didn't see what he did with it; only in conversation is all I know. My conversation with him is all I know about it. I didn't see what he did with the letter after he prepared it. I received the proceeds of the check from Mrs. Roy Martin in Portland, Oregon. By prearrangement with Roy Martin, I was to take Mrs. Martin down to Joe Mazurosky's place of business and she was to get this money and I was to take my share of it. Mrs. Crangle and Mrs. Martin,

(Testimony of John M. Gray.)

T. A. Andrews, and myself and my wife all arrived in Portland the same day, and Mrs. Martin and myself got in a taxicab and drove to the business establishment of Mr. Mazurosky and I sat there in the cab and she went in and came back out and she had some money. I saw her go in and talk to some one inside and they went back in the back and in a few minutes she came back out and said she had the money and we went back up to the President Hotel. The check is for Four Hundred Fifty ($450.00) Dollars. When we got back to the hotel, I received the amount of this check less fifteen (15%) per cent and less twenty-five (25%) per cent.

Mr. Strayer: Q. Do you know what the fifteen per cent was deducted for?

Mr. Biggs: If the Court please, we——

The Court: You can cross examine.

The Witness: Shall I answer the question?

The Court: Yes.

A. Fifteen per cent——

Mr. Biggs: Just one minute. Will the witness answer whether he can say "yes" or "no", and then I may want to object.

The Court: Answer "yes" or "no".

The Witness: Ask the question again please.

Mr. Strayer: Q. Do you know what the fifteen per cent was [78] deducted for?

A. Yes, sir.

Q. What was it deducted for?

Mr. Biggs: If the Court please, I object to that unless the witness can say from his personal knowl-

(Testimony of John M. Gray.)

edge what that was. He may be relying on hearsay or something else.

The Court: Yes, I think the preliminary proof is sufficient, but I think you had better find out the sources of this answer.

Mr. Strayer: Q. Now you say that you and Mrs. Martin went down to Joe Mazurosky's place of business. Did you know Joe Mazurosky at that time?

A. No, sir.

Q. Did you see the man that Mrs. Martin talked with in Mazurosky's place?

A. Yes, sir.

Q. Do you know who that man was?

A. Well, I understood it was Joe Mazurosky.

Q. Well, do you know who it was now?

A. I think it was Joe Mazurosky.

Mr. Biggs: I move that that be stricken.

The Court: Overruled. Just a moment; when you say you think, you mean you believe that you now recognize as the defendant the man that she talked to, or what do you mean?

A. The fact of being his place of business and the man being about his height, I would be of the opinion that it was him. I wouldn't swear that it was; I couldn't positively identify him as the man that she went in and talked to; I only think so.

Mr. Biggs: I renew my objection, if the Court please.

The Court: Overruled.

Mr. Biggs: An exception.

The Court: Exception allowed. [79]

(Testimony of John M. Gray.)

The man that Mrs. Martin talked with in the Store was behind a counter.

By Mr. Strayer:

Now going back to Seattle, Mr. Gray, at the time you delivered this check to Mr. Martin why did you deliver it to Mr. Martin?

A. For him to get someone to cash the check.

Q. Do you know why Martin sent the check to Joe Mazurosky?

Mr. Gallagher: That calls for a conclusion, Your Honor.

Mr. Strayer: I guess I assumed a fact that is not in evidence.

Q. I will ask you now, do you know through conversation with Martin what was done with the check?

Mr. Biggs: If the Court would instruct the witness to answer these preliminary questions "yes" or "no" then my objections would not be premature.

The Court: You may answer if you had a conversation. Answer "yes" or "no".

A. I had a conversation with Martin, yes, sir.

Q. Do you know from that conversation what was done with the Mershon check?

Mr. Biggs: If the Court please, we object to that as calling for a conclusion.

The Court: Answer "yes" or "no".

A. Yes.

Q. What did Martin tell you as to what he had done with the Mershon check?

(Testimony of John M. Gray.)

Mr. Biggs: If the Court please, we object to the witness answering that question on the ground that it would be hearsay, there being no sufficient or any prima facie showing of any partnership in crime or otherwise between Mr. Martin and Mr. Mazurosky, and therefore no sufficient foundation laid for the introduction of any statements, declarations, or evidence of any acts of omission or commission done in the absence and out of the presence of the defendant. [80]

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Yes.

A. My conversation with Roy Martin was that he mailed the check to Joe Mazurosky.

Mr. Strayer: Q. And did he tell you anything about the arrangement with Joe Mazurosky?

Mr. Biggs: If the Court please, may we make the same objection and have the continuing objection to any testimony asked for and given by this witness in connection with statements or evidence of facts or declarations on the part of Martin?

The Court: Yes.

Mr. Biggs: I make the same objection at this time, Your Honor.

The Court: The objection is overruled.

Mr. Biggs: And may I have an exception?

The Court: An exception is allowed.

Mr. Strayer: Q. What did he tell you?

A. It would cost me fifteen per cent (15%) to get the check cashed through Joe Mazurosky.

(Testimony of John M. Gray.)

As I previously stated, my arrangement with Mrs. Martin was that she would go with me down to Joe Mazurosky's and we would obtain this money and I would take my part of the money and Mrs. Martin was to keep his part of the money.

Q. And under your agreement with Martin what percentage of the check were you to receive?

A. I received a total of sixty (60%) per cent.

Q. And what was to be done with the balance of the money?

A. Fifteen (15%) per cent would go to Joe Mazurosky for collection, twenty-five (25%) per cent to Martin and Cragle, and sixty (60%) to Nelson and myself.

We were paying Martin and Crangle twenty-five (25%) per cent for advance information concerning these people. [81]

Referring to the time when I received the Mershon check on October 29th, after having a conversation probably one or two days previous to that with Mr. Martin and Mr. Crangle they told me circumstances of a fake cataract operation on Mrs. Mershon, or Mr. Mershon, one or the other of them. I went to the home of these people on this date and made an examination of the party that was supposed to be operated on, I don't recall which one now. I remember explaining that I was there for the purpose of giving them back the money in the event that it wasn't cured, that the doctor that operated on them had had an accident of some kind and probably was killed; any-how, after my exami-

(Testimony of John M. Gray.)

nation I told them it wouldn't be cured without the use of a radium belt and explained to them a radium belt was very valuable, only twelve of them in the United States; the doctor that made them had died with the secret. The windup of the conversation was that they deposied this amount of money with me as surety, one of these belts to be delivered to their home and used for a period of thirty days, and that is how I obtained the check.

To my knowledge there was no such thing as a radium belt. There was nothing more the matter with these people than senility or old age. At the time I talked with them I was using the name, Dr. Pierce. I also went by the names of Miles, Hamilton, Howard, Clayton, Cox and others. I understood that the name T. A. Andrews was the correct name of the party who was with me. He also went by the name of Thomas, Judge Thomas, and I so introduced him to the Mershons. I represented Thomas as an attorney, settling the estate of the doctor who had been killed and who had performed the operation on their eyes. Thomas is at this time in a Federal penitentiary in Virginia. I understand Roy Martin and Herbert Crangle are in the Federal penitentiary at Atlanta, Georgia. [82] Crangle usually went by the name of Dr. Avery. Martin, when performing the operations, usually was represented as Dr. Miles.

Referring back to the time when I received the proceeds of the Mershon check, I will state that I met Mr. Mazurosky about a week thereafter, for the

(Testimony of John M. Gray.)

first time. I was introduced to him by Roy Martin at the St. Andrews Apartment Hotel in Portland, Oregon.

Q. And what were you doing there at the St. Andrews Apartment Hotel?

A. Mr. Martin was living there at the hotel. I was down there to see him and I just met Mr. Mazurosky, that is all.

The Allen check, Exhibit 3 for identification, which you have handed me was received by me sometime in September, 1934. I went to the home of Clara Allen and her brother somewhere around Boulder, Colorado. The Exhibit is a cashier's check.

Mr. Strayer: Q. And how did you receive possession of it?

Mr. Biggs: If the Court please, do I understand that my objection goes to all this testimony, there being no showing that the defendant was present there at the time and it being statements and acts of persons outside of the presence of the defendant?

T. A. Andrews and I drove to the home of Clara Allen and her brother, out of Boulder, Colorado, and I talked to Miss Allen and her brother and performed a so-called fake cataract operation on the brother's eye and went to town to get this money. She drove her car and we followed in another car. She didn't have the money in the bank. They had some Liberty bonds and these were at the bank in the name of the brother and she couldn't obtain these bonds, so she had to go back home and get an order for them, and it was then too late to get the

(Testimony of John M. Gray.)

bonds out of the [83] bank that day so I instructed her to go the following day and get the bonds or the cash money and I would be back in a few days to get it, but I didn't. I waited a couple of weeks and I sent Mr. Andrews out there early on Sunday morning. That day he returned with the check and gave it to me. I received the check from T. A. Andrews about twelve or fifteen days after the date noted on the check. I was working with Andrews at that time.

I performed the operation on Miss Andrews' brother. Due to senility, his vision was dim and I explained to him that I could make him see with radium treatment. I dropped a few drops of Murine eye water into his eye and removed a piece of skin that I had—I was supposed to have removed it—and that was all there was to it. He did have a cataract but I did nothing about it. The check was given me in payment for the operation. I was using either the name of Miles or Pierce, I am not sure which. Andrews was using the name of Thomas. Miss Allen's brother received no benefit from the operation. After receiving the check, I gave it to Roy Martin. He told me he could send it to Portland for collection and it would cost me fifteen (15%) per cent. He told me he was going to send it to Joe Mazurosky. He wrote him a letter and put it in an envelope and dropped it in a mail box in Denver, Colorado. After he mailed the letter, I later received the proceeds of the check. Mr. Martin gave me Five Hundred ($500.00) Dollars less fifteen

(Testimony of John M. Gray.)

(15%) per cent, which is Seventy-five ($75.00) Dollars, in Seattle—a few dollars less than that because he told me that the money had been wired to him. That was about the first or second week in October, 1934. I went back to see Miss Allen in 1935. When I was there the first time they had two thousand dollars in Liberty bonds and I went back there to get the balance of them if I could. I talked to Miss Allen; found her in the cow pen milking a cow. It was [84] early in the morning. I went in and talked to her and she didn't recognize me. As soon as I began to talk about eyes she told me she had been swindled out of Five Hundred ($500.00) Dollars and if I would go down town and talk to the district attorney he would tell me all about it, and so that was all I wanted to know and I drove away. She did not recognize me as one of the men who had been there before. I wore no disguise.

(The check, Government's Exhibit 15, for Identification, was thereupon marked.)

The first time I ever saw the Exhibit marked Government's Exhibit 15 for identification was at the trial in Portland. I can't say that I recognize the handwriting. When Martin sent the checks to Joe Mazurosky, he used the name of R. E. Terrell.

Cross Examination

By Mr. Biggs:

Q. Did you see that, Mr. Gray?

A. Yes, sir.

I first met Martin in 1931 or 1930. It is my understanding that he is now in the Federal penitentiary

(Testimony of John M. Gray.)

at Atlanta. Terrell was an improvident type of fellow. I don't know whether he ever borrowed money from Joe Mazurosky. I did not meet Mr. Mazurosky until a week or ten days after one of those transactions and that was at the St. Andrews Hotel. It was just a passing introduction and there was no conversation. There were other people there. Referring to the $425.00 or the $500.00 check, it is my statement that $75.00 was deducted from that check so far as I was concerned; a few dollars over that to take care of the cost of wiring the money from Portland to Seattle. I don't remember how much I received, but it wasn't $425.00. I recall that I testified at the trial in Portland that I received $425.00 on that check. I recall that at the previous trial there was some talk of wiring charges. I don't know that any one has talked with me since the [85] other case. I was first approached regarding the case in the summer of 1936. That was by C. W. Bulong, Post Office Inspector, Dallas, Texas; also by Mr. Mann, Post Office Inspector of Washington, D. C., I have talked with no one else. I talked with Mr. C. B. Welter, Post Office inspector for the Oregon District in 1937. That conversation was held at the Texas penitentiary. Mr. Welter did not take a statement from me. The other men took statements. I have been indicted on the eye racket scheme and I pleaded guilty in Norfolk, Virginia. Sentence was suspended on that charge for five years. I understand that I will be called into court for sentence on that charge in five years.

(Testimony of John M. Gray.)

The plea I referred to was entered in 1937, after I had talked with Mr. Welter. I am under indictment in Wisconsin. I am now serving time in Texas, fifteen years for assault and attempt to murder. I am also serving ten years for a swindle in the nature of one of these cases. I am likewise serving ten years on another case of grand theft, one of these same cases, but the conviction was grand theft. That was at Livingston, Texas; also ten years for swindle at Kaufman, Texas, and eight years at Lufkin, Texas. That is forty-three years all told that I am serving. Ten years of these sentences run concurrently. I actually have to serve thirty-three years. I believe I went into this game in 1930. Prior to that time, I was a licensed optometrist in Fort Worth, Texas, from 1923 to 1930. I practiced optometry legitimately. I had engaged in no criminal activity prior to 1930. I had not been tried or convicted of anything prior to 1936. Between 1930 and 1936 I did not devote all of my time to this game or racket. I owned a restaurant in Hollywood, California, and operated it. I built the restaurant in 1935 and sold it since I have been in the penitentiary. Between 1930 and 1935 practically all of my time was devoted to the eye racket. That was my only means of livelihood. It was my intention in [86] the eye racket to deceive, and mislead poor old people. I wouldn't call it robbery because it did not involve force. When I called upon Mrs. Mershon and Miss Allen, I represented myself as something that I was not. When I told them I could cure them,

(Testimony of John M. Gray.)

I knew that I was unable to. I knew that the treatment I prescribed was false and inadequate. When I took their money, I took it knowing that I had deceived them. I knew that I had not given them value received.

I have acquired a technique effective in deceiving people and where it has been to my advantage, I have deceived and mislead people. I don't know whether it is difficult for the ordinary observer to determine when I am and am not telling the truth. I attempted to cultivate the bedside manner, and a fluency and art of apparent sincerity. I was fairly successful in these matters.

By Mr. Biggs:

Q. How many persons do you think you have deceived or misled in connection with this scheme?

A. Probably a thousand.

Redirect Examination

By Mr. Strayer:

No one has made me any promises in consideration of my testimony in this case. No one has told me or led me to believe that I will receive any special consideration for testifying. There is no consideration that could be given me and I have nothing to gain.

MRS. CHRISTINE MERSHON

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

My name is Christine Mershon and I live at McMurray, Washington. I signed the check which you have shown me marked Government's Exhibit No. 1 for identification, on October 29, 1934. [87]

Q. Just tell us briefly, Mrs. Mershon, how you happened to make out and sign that check.

Mr. Biggs: If the Court please, may we make the same objection that has hitherto been made with respect to statements, declarations, actions and so forth made outside the presence of the defendant, on the ground that there is no sufficient showing that the defendant had any knowledge of this transaction.

Court: Objection overruled.

Mr. Biggs: And an exception, if the Court please.

The Court: Exception allowed.

Mr. Biggs: May that objection run clear through this testimony, Your Honor?

Mr. Dillard: Q. Go ahead, Mrs. Mershon, just tell us briefly how you happened to make out that check.

Two men came to the house one day. I had another couple of men come the week before. They told me I had bad trouble in my eyes and I would have to go to a Los Angeles hospital for treatment. I told them I couldn't afford that, and one of them, Dr. Miles, said he had very good medicine in his car

(Testimony of Mrs. Christine Mershon.)
right at the door and he would test my eyes. It was simply water; I didn't feel any pain or anything. He poured that in and then he took a little—it looked like the skin next to the shell of the egg. He said that was poison. Then he said the medicine would cost about three hundred dollars, he had to send to Paris, France, for it, and if it cost more or less he would bring back the change. I thought that was too much but he says no, he would bring back the change, and then I told him I had no money at home; that it was in a bank in Arlington. He said he would take me in his car down to Arlington. Another man with them, Dr. Avery went with us down to Arlington and there the banker reluctantly gave me the money. When I came out of the bank, they were a block [88] below; said they had to get some gas or something for the car. I went down and Dr. Miles said, "Have you got the three hundred ($300.00) ?" and I said, "Yes", and handed him the three hundred. They took me home, and they said they might come back to see if the medicine worked, but did not come again. The following week, another couple came, Dr. Pierce and Judge Thomas, and they said, "Did the medicine help you?" and I said, "No", and they said Dr. Miles was killed in Seattle, overrun by a car, and the last thing he said was to return to Mrs. Mershon the Three Hundred ($300.00) Dollars she paid for the cure if she isn't cured. He said, "I will test your eyes", and then said, "No, it hasn't done any good, I will give you medicine for it", and he gave his name as Dr.

(Testimony of Mrs. Christine Mershon.)

Pierce. He said it would take $450.00 more to pay the expenses. I told him I was sick and couldn't go to the bank that day. He furnished me a check blank which I signed. I gave it to Dr. Pierce. They told me the Banker would send the money as soon as I directed him to and promised to come with an electric belt that takes the disease out of ones system. They didn't come with the belt and didn't return the change and that is the last I have seen of them. We turned the cancelled check over to Mr. Welter. I saw Doctor Pierce outside here yesterday. (John M. Gray was thereupon produced in the court room.) The man you have just brought into the courtroom is the Dr. Pierce that I have referred to in my testimony.

MISS CLARA E. ALLEN

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

My name is Clara Allen and I live near Longmont, Colorado. I have examined Government's Exhibit 3 for identification which you have handed me and state that it is a draft given to me by W. E. Gregg of Boulder, Colorado, the Mercantile Bank. I made arrangements to have the bank issue it. After obtaining the draft [89] I gave it to a man that came with this Dr. Miles. I saw this Dr. Miles the day that I got this draft.

(Testimony of Miss Clara E. Allen.)

Q. Tell us about it. How did you happen to see him?

Mr. Biggs: If the Court please, may we have the same objection to this witness's testimony that has hitherto been made, and on the additional ground that it does not have to do with any charge set forth in the indictment?

The Court: Yes. The objection is overruled.

Mr. Biggs: And an exception, if the Court please.

The Court: Allowed.

Mr. Dillard: Q. All right, go ahead, Miss Allen. Just tell about seeing Dr. Miles.

Dr. Miles and another man came into my home on the 12th day of September, 1934, and Dr. Miles said that was his name; that he came from Chicago to Denver to treat a cancer case and this man was an oculist and he came out into the country with him to view the country, and this other man had some superior kind of spectacles that he wanted to put out in the country for an advertisement. They wanted to examine my eyes and Dr. Miles did that and he said I had a growth on my eyes of a cancerous nature and he said he had a little bit of this cancer medicine left that he used in Denver and that he could perform an operation in the home if I wouldn't say anything about it and that it would only take a few minutes and wouldn't be painful or anything. He performed the operation. He daubed something in my eyes, something that looked like a sponge and then in a few minutes he took out what looked like a round ball and then he stretched that

(Testimony of Miss Clara E. Allen.)

out in his fingers and it looked like skin. He put it in his pocket, I expect to have for the next dupe. Nothing was said about pay until after the operation. He hinted around to find out if we had any bonds and I answered "Yes", and he wanted to know if we had five hundred, and I said, "Yes", and so he made [90] out a bill for $587.50. The eighty-seven dollars and a half was cash. The bonds were my brother's and he had to go over to Boulder with us. They said they would be back in the evening for their pay. They didn't come, but on the 23rd of September the man that was with Dr. Miles came out and said he was a solicitor sent out to collect Dr. Miles' bills, and he wanted me to pay him. He wrote out a receipt and signed it J. J. Cannon, someplace in Denver. I have examined Government's Exhibit 15 for identification and state that that is the receipt I have testified to. I have not seen these two men since, but there were two men that belonged to the gang that came last August.

(No Cross Examination)

MR. HERMAN H. HORACK

was thereupon produced as a witness in behalf of the United States, and having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

I am a detective of the Portland Police and have been so employed for nineteen years. I know the de-

(Testimony of Mr. Herman H. Horack.)

fendant, Joe Mazurosky. I have examined Government's Exhibit 1 and state that I have seen a photograph of it before. That was around December 18th, 1934. After getting the photograph, we took the check and went down to Mazurosky's store on the northeast corner of Sixth and Davis, in Portland. I showed Mr. Mazurosky the check and talked with him about it. The endorsement "Joe Mazurosky" appeared on the photograph of the check we had. I just asked Mazurosky if he had cashed a check and he said he had and that that was his signature. I then told him that the check was obtained in a bunco game, and he had told me that he didn't know how the check was got. He told me he didn't know the whereabouts of the party who gave it to him. He told me that the party was a doctor. Detective Eichenberger of the Portland Police was with me.

Cross Examination

By Mr. Biggs:

The conversation I have referred to was around December 18th or 20th, 1934. In this conversation with Joe I told him it was obtained in a bunco deal. He did not tell me that it was not so obtained. He told me that the check had come to him all right. I remember talking with Mr. Mazurosky concerning the identity of [91] these people; I recall that now. He said the party was a doctor. I recall testifying in this case before, in Portland.

Q. Do you recall my asking you on cross examination this question: "did you ask him anything about that, did you ask him who they were, who

(Testimony of Mr. Herman H. Horack.)

gave the check to him? Did you ask him that?" "Answer: I don't believe I did." Do you recall giving that answer?

A. I don't recall saying that.

Q. Would you say that you had not said that?

A. I might have said that.

Q. Are the details of that conversation somewhat hazy in your recollection after the lapse of time?

A. In going back and running this thing over in my mind the things that will come back to you—I have a lot of cases and you know after you get on a case and you begin to look back at your records these things come back to you.

Q. And that is how this has come back?

Q. Now that you think about it it is your best judgment that at the previous trial you might have said that?

A. Yes.

(Redirect Examination.)

By Mr. Dillard:

I made a record at the time I interviewed Mr. Mazurosky. We made reports of our investigation at the time. I have seen part of the report since it was made. I have refreshed my recollection since this happened in 1934 by thinking over the different things that were said. In refreshing my memory I consulted a part of the original report that I mentioned. I do not remember whether Mr. Mazurosky told me that the check came to him in person or by mail.

ALBERT EICHENBERGER

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard: [92]

I am a detective of the Portland police and have been so engaged for thirteen and a half years. I was a detective in 1934. I know the defendant, Joe Mazurosky. I have heretofore seen a photostatic copy of the check you have handed me, Government's Exhibit 1 for identification. About December 20th, 1934, I talked with Joe Mazurosky about it, in the presence of Detective Horack. We had an inquiry regarding the check and from Mt. Vernon and we asked him if he had endorsed the check and he said that he did and that he had cashed it at the Bank of California. We asked him how he happened to get this check for $450 and he said that a man had purchased some goods; that after he had cashed the check he had given the man the balance of the money back and kept the money that was due him on the merchandise that was bought. There was some discussion about the endorsements but I do not recall that. We did not find the party who had endorsed ahead of Mazurosky on the check.

(No Cross Examination)

E. F. MUNLEY

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

I am the auditor of the Bank of California, Portland, and have so served for about ten years. Referring to Government's Exhibit 4, I have here in the Court room the records of the bank concerning that check.

(The document was thereupon marked Government's Exhibit 27 for Identification.)

This is the original deposit slip.

(Another document was thereupon produced and marked Government's Exhibit 9 for Identification.)

Government's Exhibit 9 for identification is a record of our Bank concerning the Belter check which you handed me a while ago. We call this record a collection register. I am familiar with banking practices including the collection department.

(No Cross Examination)

DONALD G. ALLEN

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

I have charge of the savings department of the Bank of California, Portland, Oregon, and have

(Testimony of Donald G. Allen.)

been so employed for 18 years. When I first started at the bank I [93] was in the collection department.

(Two documents were thereupon produced and marked Government's Exhibits 8 and 28, respectively, for Identification.)

Referring to the blue slips marked Exhibits 8, 27 and 28 for identification, which you have handed me, will state that No. 8 was received by my assistant. There is no identification on here at all as to where the check was drawn on at all. The strip of paper is a deposit tag to Joe Mazurosky's account with the Bank of California. Exhibits 28 and 27 are deposit slips that were made and signed by Mr. Mazurosky depositing this to his savings account in our bank, the Bank of California. They all bear his signature. You have handed me Exhibits numbered 1, 4 and 5. This one is a photostatic copy bearing our endorsement; that went through and also the one from Rockford.

Q. Let me ask you, is there anything on the blue deposit slips, any record which enables you to identify the kind of a deposit that was made at the time?

A. Yes, sir, there are except for one and that is the one that my assistant took.

Q. Tell me about the two that you know about then. You have got three altogether.

A. The three hundred dollar check I took in. It bears my initial on the deposit tag, and that is on Rockford, Washington. The five hundred dollar

(Testimony of Donald G. Allen.)

check bears my initial on the deposit tag and was on Kennewick, Washington. The deposit tags were made out completely by Mr. Mazurosky, putting the number of the bank, which is a code with us, like 98-147 means Kennewick, Washington; 98 is the State of Washington, 147 means the First National Bank of Kennewick. That is for the benefit of the jurors. That is our code that we have, and in all cases except this other one Mr. Mazurosky put them on the deposit tag and made the numbers. I have in my hand a photograph of the Deibert check, Exhibit No. 5. I remember the circumstances under which that came into my hands when the deposit was made at the Bank by Joe Mazurosky. Mr. Mazurosky deposited it and asked that we send it direct instead of through the Federal Reserve Bank, for the reason that he wanted quick action, quick returns on the check. Also at his request we put a "No Protest" stamp on the face of the check, which is very unusual in the savings department—it is very common in the commercial but unusual in the savings because our checks are not handled in that way; they are not doubted [94] at all. In this case it was. On this check, payment was stopped and it was returned. The drawer of the check, the Farmers & Merchants Bank at Rockford, stopped the payment. Thereafter the check was returned to the Bank of California. I can't testify to the disposition of the check. It was not charged to the account that I know of. Mr. Mazurosky deposited that three

(Testimony of Donald G. Allen.)

hundred dollar check in his savings account in the Bank. It went thru the bank on which it was drawn and was returned with payment stopped. I can't say whether it was charged back to his account.

Referring to the Belter check, Government's Exhibit 4, we have a record of that one. This check was sent through the same way as I have explained before. Mr. Mazurosky asked that we send it direct to the bank because he wanted a return on it, and it was my fault that it didn't go. It didn't go direct. I will explain. Our checks as a rule go through the Federal Reserve Bank unless we make a special notation to what we call our transit department. I am referring to the Federal Reserve Bank in Portland. By going through the Federal Reserve Bank there is a delay of one day in getting returns. In order to put it through otherwise, we put a special notation and send it to our transit department and it goes direct to the bank. At the request of Mr. Mazurosky, we put the special notation on the check and also a "no protest" stamp at his request. This check was returned and I called Mr. Mazurosky up about it and asked him if he wanted us to charge the account and return it to him in the usual course through the mail and he said no, that he would come in and take it up. He did come in and signed a withdrawal slip charging his savings account:

(The withdrawal slip was thereupon produced and marked Government's Exhibit 29 for Identification.)

(Testimony of Donald G. Allen.)

I now explain the operation of the withdrawal slip in banking practice. It is nothing more than a receipt. It says: "Received from the Bank of California, Portland, Oregon, $500," and Mr. Mazurosky presented his pass book, we charged his account with this $500, and he signed the withdrawal, and in lieu of this we gave him this five hundred dollar check. We returned it. Referring to the Deibert check, I don't remember how he took it up. He came in and signed a withdrawal for the Belter check. I have looked at "triplicate form, No. 9." After the $500 dollar check was returned, he signed a withdrawal for it and took it over to another department which is called the collection department and sent it through for collection. We sent it back to the First National [95] Bank of Kennewick, Washington. Referring again to the Belter check, we didn't through the bank channels charge it back. I phoned Mr. Mazurosky and he came into the bank and signed a withdrawal for the full amount and we then surrendered the check to him, the N. S. F. check, and we then charged his account for $500. It showed in his savings account.

(Cross Examination.)

By Mr. Biggs:

It is unusual to send a check through for collection. We send them through if they are doubtful. Where we know a depositor it is very unusual.

Q. I mean for a depositor to deposit a check for collection.

A. It is unusual, yes.

(Testimony of Donald G. Allen.)

Q. You say it is unusual?

A. Yes.

Q. The bank does it every day, does it? It is a recognized practice?

A. Yes, we do it at the request of a customer. We don't do it unless it is requested, and unless somebody is in doubt as to the check. We do it whenever we are requested to do it and we receive such requests occasionally. There is a recognized procedure for it. When the bank takes paper for collection, or for sending it direct, we have the right to charge for it. It is optional with us whether we charge for it or not. We did charge Mr. Mazurosky. The bank at Kennewick charges us and we receive no compensation oursolves. There is a clearing house rule giving us the right to charge according to a scale agreed on.

(Redirect Examination.)

By Mr. Dillard:

As to the Deibert check, Mr. Mazurosky made the request that a "No Protest" stamp be placed on it, that is all. The object of the "No Protest" stamp on a check is the fact that if it is refused by the bank which it is drawn on, then they have a right for suit. If they just return it to us then the person who draws the check has absolutely no proof that it was ever presented at the bank. That is the object of being protested. For instance, if this check had gone up there and they stopped payment on it, they would have to protest it; there is a notary fee on it,

(Testimony of Donald G. Allen.)

and it would prove that the check was presented on a certain date for payment and refused, [96] and the statement would be made why it was refused, either payment stopped, insufficient funds, or whatever it might be, but if a check goes to a bank and they refuse payment and send it back without protesting, then if a suit is started—it is just a proof, and that is all, that it was presented to the bank and that the bank refused payment on a certain date, but a "No Protest" stamp placed on there is an instruction from us that they are not to protest it or incur any legal fees on it at all, that we are willing to receive it back without that process. There would be a fee or charge to the depositor in case a protest stamp were affixed. Different states carry a different charge. The charges range in a varying schedule. It is an unusual procedure to put a "No Protest" stamp on a check received at the savings department. That is because the average depositor knows that the check is good; they are not doubtful at all and there are funds here to charge it back to if it was turned down in any way.

(Cross Examination.)

By Mr. Biggs:

I believe in the state of Washington they have either a three or four dollar protest charge and there is 25 cents for each notice sent. I am not sure as to the actual amounts. There are sometimes service charges in addition, and I have seen charges as high as $8.50 for notary fees, and I have seen them for fifty cents.

ROBERT E. GOLDMAN

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn was examined and testified as follows:

By Mr. Dillard:

I am in the banking business at Rockford, Washington. I have examined Government's Exhibit 5 for identification, and state that I have seen an original check of which the Exhibit is a photograph. I know Mr. Deibert, the marker of the check. He was a customer of my bank at the time the check was written. There is a "payment stopped" notation on the check which was placed there by Miss Mills, the cashier of our bank. I was present at the time. After this notation was placed on the check, we mailed it back to the Federal Reserve Bank in Spokane. We put the "payment stopped" notation on the check because Mr. Deibert had come into the bank sometime in November and asked to borrow some money, saying that he was getting his eyes cured, and he asked me to fill out a note and hold it until the check came in and then place the note to his credit in the [97] bank and pay the check. The check came in and I called him up that morning, it looked kind of queer to me—and asked him if he wanted to pay the check and he decided he didn't want to pay it, and so I returned the check. We received the check from the Federal Reserve Bank in Spokane, Washington.

(Testimony of Robert E. Goldman.)

(Cross Examination.)

By Mr. Biggs:

We have two employees in the Rockford bank besides myself—the cashier, Miss Mills, and a young fellow that works there part times. We do not have a stenographer. Either Miss Mills or I handle the correspondence. Miss Mills takes care of returning the items and mailing the drafts to the Federal Reserve Banks for the checks that come in. I couldn't state that the check was placed in an envelope and deposited in the mails and returned to Spokane. I have no personal knowledge of the incident. Either Miss Mills or I take the mail down. I may have carried it down myself. I could not say. All of our correspondence of this kind is handled by mail.

(Redirect Examination.)

By Mr. Dillard:

At the time it was the custom of the bank to always use the mails in transactions of this kind.

J. L. BLISS

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

My occupation is that of assistant cashier of the First National Bank, Kennewick. I have examined

(Testimony of J. L. Bliss.)

Government's Exhibit 9 for identification which you have handed me and state that these are collection slips, to which was attached a $500 check signed by H. F. Belter. I have examined Government's Exhibit 4, the Belter check, and recognize it as the original $500 check. It was sent to us by the Federal Reserve branch of the Spokane Bank on September 21st, 1935, and we received it on September 23rd, 1935, and we returned it to the Federal Reserve Bank that same afternoon on account of uncollected funds. We finally received the check on September 28th, 1935, from the Bank of California, at Portland. At that time we received the documents I have in my hand, No. 9, accompanying the check. The check was received by us as a collection item. The check was paid at that time, September 28th, 1935, the same day we received it. [98] Government's Exhibit 9, the collection record, bears some notations in my own handwriting. Fifty cents is the exchange, at the rate of ten cents a hundred. We sent them a draft for $499.50, a draft on the First National Bank of Portland. That is the correspondent bank of the First National Bank of Kennewick. We paid the Belter check the second time it came to the bank. We paid it with a draft.

(A document was thereupon produced and marked Government's Exhibit 11 for Identification.)

Government's Exhibit 11 for identification, is a draft on the First National Bank of Portland, Oregon. It was written on September 28th, 1935 for

(Testimony of J. L. Bliss.)

$499.50, payable to the Bank of California, at Portland, Oregon. This is the draft which we sent in payment of the Belter check when it was finally paid. I made out and signed the draft myself. After making out the draft in payment of the Belter check when it was finally paid. I made out and signed the draft myself. After making out the draft in payment of the Belter check, I sent it by mail to the Bank of California, at Portland, Oregon. I sent it direct, not through the Federal Reserve, and then we stamped their collection slip "paid" with our bank stamp and took off the fifty cents charge. I put the draft in an envelope, addressed it, and put postage on it and then deposited it in the United States Mail directed to Portland. The draft is dated September 28th, 1935. It went out on the afternoon mail. The funds for payment of the Belter check were placed to Mr. Belter's account and credit on the same day this check came in, September 28th, 1935. There was a real estate mortgage on his property. The bank loaned him the $500.

(Cross Examination.)

By Mr. Biggs:

I personally put the draft in the mail. I enclosed the draft in an envelope, addressed it, stamped it and dropped the envelope in the mailbox. When the Belter check came to the bank and there was money available to pay it, we cashed the check.

Q. That is, you charged his account and credited your own account O the bank's account—with five hundred dollars; isn't that correct?

(Testimony of J. L. Bliss.)

A. This five hundred dollar check—the original five hundred dollars, was placed to Mr. Belter's account and then we charged this five hundred dollar check up to his account.

Q. That means you deducted that five hundred dollars from his account and you credited the bank's account? [99]

A. Credited the bank's account with this draft.

Q. That is, your own bank's account?

A. Yes.

Q. In other words, you cashed the check, did you not?

A. Yes. For cashing the check and making out the other check, we charged a fee of fifty cents. We then forwarded it to the other bank. It is customary for banks to make a charge of that kind at the rate of ten cents a hundred dollars. It is an agreed rate. The rates vary with banks in other districts.

ROBERT C. GEENTY

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Dillard:

I am a teller, with the U. S. National Bank of Portland. I was so employed during the year 1934 in the collection department. I have examined Government's Exhibit 3 for identification, the Allen

(Testimony of Robert C. Geenty.)

bank draft which you have handed me, and state that I have seen that document before. I have with me some records of the bank concerning it. Naming these records, they are a copy of collection receipt in the name of Joe Mazurosky covering a five hundred dollar draft drawn by the Mercantile Bank of Boulder, Colorado, on the U. S. National Bank of Denver, Colorado. It is signed by Joe Mazurosky and signed by myself. The document refers to the Allen draft which you gave me; it bears the corresponding number; 283427 is on the endorsement on the back of the draft and also on the receipt, our collection record—out-going record. I call these documents the record and the receipt. The receipt was what I described first. The draft was presented to us on September 25th, 1934, by Joe Mazurosky, for collection with instructions to send air mail, wire fate, rush, and it was sent out that day to the Federal Reserve Bank of Denver, Colorado, for presentation to the U. S. National Bank of Denver, with the instructions to wire fate, and on September 27th we received a wire stating the collection was paid.

(A document was thereupon produced and marked Government's Exhibit 30 for identification.)

Exhibit 30 for identification is what we call a duplicate collection receipt. The words "Joe Mazurosky" in the left-hand corner, must have been

(Testimony of Robert C. Geenty.)

placed there by Joe Mazurosky, because we don't take checks for collection unless the depositor is [100] properly identified. The check was presented to me and I signed the receipt. That is my writing. I made it out. My writing on the receipt refreshes my recollection with respect to the conversation I had with Mr. Mazurosky. Mr. Mazurosky told me on presentation to collect the check for him, send it air mail, wire payment or non-payment. Mr. Mazurosky received the proceeds of the check. The blue document attests that.

(The document was thereupon marked Government's Exhibit 31 for identification.)

The document marked Government's Exhibit 31 for identification, which you have handed me, is our check. When we received the wire that the check was paid, we issued a collection department check payable to Joe Mazurosky, signed by an officer of the bank, for $498.60, and it was endorsed by Joe Mazurosky and O. K.'d by myself and cashed by our payroll teller. It bears Payroll stamp No. 2. The check was sent east for collection by air mail. I put it in an envelope and addressed it and paid the postage on it and put it in the United States mail.

Cross Examination

By Mr. Biggs:

I did not personally do that nor did I see anyone do it. It is the usual procedure and that is

(Testimony of Robert C. Geenty.)

what I base my conclusion on. The check was in the amount of $500, and after it was collected, I paid over the proceeds of $498.60. Part of the charge was for wiring and part for collection. Our collection charge was fifty cents. The charge varies according to the amount.

Redirect Examination

By Mr. Dillard:

It is the custom of the bank in sending items for collection to use the air mail or the regular mail.

Stipulation of Counsel

By Mr. Strayer:

That is correct, your Honor. It is stipulated that an original check dated December 6th, 1935 on the Farmers & Merchants Bank of Rockford, Washington and payable to J. C. Adams in the sum of three hundred dollars, signed E. C. Deibert, endorsed J. C. Adams and Joe Mazurosky, of which Government's Exhibit 5 is a photostatic copy [101] thereof, was sent by the Federal Reserve Bank of San Francisco, Portland branch, from Portland in the State and District of Oregon on December 7th, 1935 to the Federal Reserve Bank of San Francisco, Spokane Branch, at Spokane, Washington; that said check was on December 9th, 1935 sent by the Spokane branch of the Federal Reserve Bank of

San Francisco to the Portland branch of the Federal Reserve Bank of San Francisco in Portland in the State and District of Oregon. It is further stipulated that it was the custom of both the Spokane and the Portland branches of the Federal Reserve Bank of San Francisco at the times that the check was so sent to forward all such items by the United States mail.

Mr. Biggs: We will waive the question of its being a photostatic copy, Your Honor, and make no point of the fact that the Government has not the original check, and we will further stipulate in accordance with the matter just dictated into the record; not to the fact of making, but the fact that it was sent and that it was the custom to send by mail, if the Court please, and the defendant personally consents to that fact.

The Defendant: Yes, that is right.

The Court: The record may so show, and a written stipulation may be signed by the Government counsel, counsel for the defendant, and by the defendant.

Thereupon a further stipulation was read into the record as follows:

It is stipulated and admitted by the defendant in open court that the check referred to in Count 1 of the indictment, being Government's Exhibit No. 1 signed Christine M. Mershon, was presented at the Portland, Oregon branch of the Bank of California, N. A., for deposit in the savings account of the defendant by the defendant personally on or

about the 30th day of October, 1934, and that said check was sent by a messenger in the ordinary course of banking business from the Bank of California to the Portland branch of the Federal Reserve Bank of San Francisco, being received by that bank on the 30th day of October, 1934, according to the custom and usage of banking practice and the course of business of the respective banks, and on the same day was forwarded by the Portland branch of the Federal Reserve Bank of San Francisco at Portland in the State and District of Oregon to the Seattle branch of the Federal Reserve Bank of San Francisco; that it was the custom and practice in the ordinary course of business of the Portland branch of the Federal Reserve Bank at said time to [102] enclose checks so received for collection in a postpaid envelope addressed to the member bank to which the same was to be sent and to place the same in the United States postoffice at Portland, Oregon to be sent and delivered by the postoffice establishment of the United States according to the address and direction thereon.

Mr. Strayer: May I interrupt? The testimony refers to certain exhibits which have been identified and not received in evidence. I think before we continue with the stipulation we should now offer in evidence the exhibits which have been identified.

Mr. Biggs: If the Court please, we will make a general objection to the introduction of any of these exhibits on the ground and for the reason that they relate to transactions and are in connection with

transactions about which the defendant had no knowledge and which the record shows he had no knowledge of; that in connection therewith statements have been made by others in the absence and not in the presence of the defendant Mazurosky; on the further ground that there is no evidence that to the defendant's knowledge these checks were taken in furtherance of any unlawful enterprise, there being no evidence that there was any conspiracy or agreement on the part of the defendant that checks or any checks might be taken pursuant to such a scheme to defraud. Now with respect to the checks, and I haven't the exhibit numbers right at hand—with respect to the Allen check particularly, Your Honor, and any checks which have not been set forth in the indictment, and the Wagner check——

Mr. Strayer: The Wagner check is in evidence.

Mr. Biggs: Oh, is it in evidence? The further objection is made that they relate to transactions upon which no crime is charged by the Government and which are not contained in the indictment or described in the indictment. I think that objection, Your Honor, covers it. There may be other grounds, but I think that covers it.

The Court: The objection is overruled. The question whether there is a conspiracy or unlawful agreement by the defendant with other persons in this case is a question for the jury, upon which they will arrive at a conclusion on consideration of the evidence. The question of whether these transactions which did take place out of the hearing of the defendant, without his personal participation

at the time, were to his knowledge and whether he was a participant or not is a jury question also, to be solved by the jury under the instructions. The objections are overruled. As to the Allen check —which transaction was that? [103]

Mr. Biggs: The Allen check is the Colorado case; it relates to Government's Exhibit .....

Mr. Strayer: Three.

The Court: The Court admits the document on the ground that it may tend to show a similar transaction and may tend to show a participation by the defendant in some transaction in which the other persons were engaged who were engaged in that particular one, and may therefore throw light on the connection of the defendant with these particular persons involved in the transaction relation to the Allen check. That transaction and the check are admitted in evidence for the purpose of showing either knowledge or intent or participation in other transactions named in the indictment.

Mr. Biggs: May I have an exception, Your Honor?

The Court: Exception is allowed.

Mr. Strayer: I understand it is your Honor's ruling that all exhibts marked for identification are admitted?

The Court: Unless there are others to which my attention hasn't been called specifically.

(The documents heretofore marked Government's Exhibits 1, 3, 8, 9, 11, 15, 27, 28, 29, 30 and 31, respectively, for identification, were thereupon received in evidence.)

The Court: You may proceed, Mr. Holmes.

(The balance of the stipulation was thereupon read by the reporter as follows:)

It is stipulated and admitted by the defendant in open court that the check referred to in Count 2 of the indictment, being Government's Exhibit No. 4, signed H. F. Belter, was presented at the Portland, Oregon branch of the Bank of California, N. A., for deposit in the savings account of the defendant by the defendant personally on or about the 20th day of September, 1935, and that said check was sent by messenger in the ordinary course of banking business from the Bank of California to the Portland branch of the Federal Reserve Bank of San Francisco, being received by that bank on the 20th day of September, 1935 according to the custom and usage of banking practice and the course of business of the respective banks, and on the same day was forwarded by the Portland branch of the Federal Reserve Bank of San Francisco at Portland in the state and district of Oregon to the Spokane branch of the Federal Reserve Bank of San Francisco; [104] that it was the custom and practice in the ordinary course of business of the Portland branch of the Federal Reserve Bank at said time to enclose checks so received for collection in a postpaid envelope addressed to the member bank to which the same was to be sent and to place the same in the United States postoffice at Portland, Oregon to be sent and delivered by the postoffice establishment of the United States according to the address

and direction thereon, and said check was received by the Spokane branch of the Federal Reserve Bank of San Francisco on the 21st day of September, 1935.

It is stipulated and admitted by the defendant in open court that the check referred to in Count 3 of the indictment, being Government's Exhibit No. 4 signed H. F. Belter was presented at the Portland, Oregon branch of the Bank of California, N. A., to the collection department of said bank, for collection by the defendant personally on the 27th day of September, 1935 and on that day was forwarded from Portland, Oregon by said bank for collection to the bank upon which it was drawn, namely, the First National Bank of Kennewick, Washington, at Kennewick, Washington; that it was the custom and practice and ordinary course of business of the Bank of California at that time to transmit such items for collection by enclosing the same in an envelope addressed to the addressee with postage prepaid and placing the same in the United States postoffice at Portland, Oregon, to be sent and delivered by the postoffice establishment of the United States according to the address and direction thereon, and said check, together with Government's Exhibit 9, was received at Kennewick, Washington by the addressed, the First National Bank of Kennewick, Washington, on the 28th day of September, 1935; that it was the established banking practice, custom, and the usage of the said First National Bank of

Kennewick, Washington to receive such collection items through the United States mails.

It is stipulated and admitted by the defendant in open Court that the draft referred to in Count 4 of the indictment, being Government's Exhibit No. 11, signed Jay D. Bliss, was on or about the 28th day of September, 1935 forwarded by said First National Bank of Kennewick, Washington, to the Bank of California, N. A. at Portland, Oregon; that it was the custom and practice and ordinary course of business of the First National Bank of Kennewick, Washington at that time to transmit such items by enclosing the same in an envelope addressed to the payee with postage prepaid and placing the same in the United [105] States postoffice at Kennewick, Washington be sent and delivered to the addressee thereof by the postoffice establishment of the United States according to the address and direction thereon; that the said Exhibit 11 was received by the Bank of California, N. A. at Portland, Oregon on or about September 29th, 1935.

Mr. Strayer: If the Court please, may we have the defendant now state in open court that he agrees to the terms of the stipulation?

The Defendant: Yes, Your Honor.

Mr. Biggs: And counsel will so stipulate.

Mr. Strayer: Both counsel?

Mr. Biggs: Both counsel.

FRANK L. KELLER

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Strayer:

My name is Frank L. Keller, and I reside at Portland, Oregon. I am chief clerk at the Western Union office in Portland and have served as such for twenty years. I have in my custody a record of telegrams sent from the Portland office of the Western Union. I have a record of two money transmittals by Joe Mazurosky in the year 1935 and one in 1936.

(A copy of telegram was thereupon marked Government's Exhibit 32 for identification.)

I have in my possession a document other than the one marked Exhibit 11 for identification, which has reference to that Exhibit.

(The document was thereupon marked Government's Exhibit 33 for identification.)

Government's Exhibit No. 33 is an official record of my office. I know the defendant, Joe Mazurosky, but do not know his signature. I have no personal knowledge of Exhibits 32 and 33 for identification; only as they were in the records, that is all. About four months ago I had a discussion with Mr. Mazurosky in our office about the documents. He asked me to secure for him information on money orders that he had sent over certain periods of time in '34 and '35. He only wanted information as to who they were going to and the amounts and the dates. We

(Testimony of Frank L. Keller.)

endeavored to locate them between the dates that he gave us and did locate such records. I am referring to Exhibits 32 and 33 for Identification. [106]

(The documents heretofore marked Government's Exhibits 32 and 33, respectively, for identification, were thereupon received in evidence without objection.)

We had no further talk with Mr. Mazurosky after we located the records, but we talked with him twice concerning the locating of the records. About a month after the first conversation which I mentioned, I had another talk with Mr. Mazurosky at our office. We hadn't found enough to satisfy him and he gave us some additional dates in which to search, and we covered a wider spread of time. We were to look under two names, Mazurosky and Morris, which were to be names of the sender. He said he might possibly have shown the name of the sender as "Morris", and for us to watch for that name. He didn't know the name of the receiver, and that was the information he wanted us to secure for him. I don't recall whether he said there was more than one receiver. I made no memorandum of the conversation; I just took the dates and names.

Cross Examination

By Mr. Biggs:

Referring to Exhibit 32, the words "agony dream" refer to the amount of money that was to be paid. They are a part of our money code. We only searched our records for money orders. One of the

(Testimony of Frank L. Keller.)

Exhibits we had in our Portland files; the other one had to be returned from San Francisco from the auditor, but they all went through the Portland office. They both relate to the same transaction.

Redirect Examination

By Mr. Strayer:

I am not familiar with the codes and cannot say what amount of money is meant by the words "agony dream." It is shown here to represent $387.50.

A. C. THORSEN

was thereupon produced as a witness in behalf of the United States, and, having been first duly sworn, was examined and testified as follows:

By Mr. Strayer:

My name is A. C. Thorsen. I reside at Portland, Oregon and am City superintendent of Postal Telegraph, which position I have held for over five years. I have a record of a money transmittal through the Postal Telegraph by the defendant, Joe Mazurosky.

(The document was thereupon marked Government's Exhibit 34 for identification.) [107]

The Exhibit 34 for identification is an official copy of the telegraphed money order as sent on October 20, 1934, by Joe Mazurosky.

(The document heretofore marked Government's Exhibit 34 for identification was thereupon received in evidence without objection.)

(Testimony of A. C. Thorsen.)

Referring to the Exhibit, the words "destiny dale ages submit seal" represent $195.92. The first word, "relax" is what we call a guard word of which we have one for each city, and it is used to check certain money transfers so there will be no fraud between different offices and they run in numerical order. Each office has a number. It is just a code word for a number.

C. B. WELTER

was thereupon recalled as a witness in behalf of the United States, and, having been heretofore duly sworn, was examined and testified further as follows:

By Mr. Dillard:

On the 25th day of August, 1936, and on the 21st day of April, 1937, I talked with Joe Mazurosky concerning certain checks sent through the United States mail. In the second conversation, Mr. Mazurosky stated: "When you talked with me last summer in regard to the Elvin check, and told me to go home and sleep on it and come back to your office the next day, you know I didn't sleep any that night, or for several nights afterwards", and he volunteered the information that the checks were probably obtained in some illegal way, but he didn't know for certain and he couldn't see what harm there would be in the event that he cashed the checks.

(Testimony of C. B. Welter.)

Then in response to my statement to him that there must have been at least a dozen of those checks, he said: "I guess there was that many." Then I said, "Joe, you know you got ten and fifteen per cent commission on those checks," and he made no reply.

Cross Examination

By Mr. Biggs:

I investigated this case for the United States Government. Mr. Martin is at this time in the Federal Penitentiary at Atlanta, Georgia. I told Joe at the conversation mentioned above, that he was getting ten or fifteen per cent commission on the checks, and he made no answer. I recall testifying in the case before, and I there testified to the same effect, but it is not in the record of that proceeding. The facts are as I stated them above, and I so testified at the former trial. If the record of the former trial does not state the conversations as I testified above, then the reporter [108] at the previous trial made a mistake.

Redirect Examination

By Mr. Dillard:

Whatever the record of the previous trial shows, I am now testifying to the facts as they occurred at the time.

By Mr. Dillard:

We rest our case, Your Honor.

(The following exhibits were offered and received in evidence.) [109]

GOVERNMENT'S EXHIBIT 1.

" Oct 29 1934 No.....

Arlington State Bank

Write name of your bank (city and state) on this line

Pay to the Order of.....$450.00

Four Hundred fifty & no/100.....Dollars

For value received I claim that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof.

CHRISTIAN M. MERSHOM

Address....."

(Endorsed on back) H. J. Pierce
O. C. Stone
Joe Mazurosky

Pay to the order of any Bank or Banker or through the Seattle Clearing House Assn.
All prior endorsements guaranteed
Oct 31 1934
19-1 Seattle Branch 19-1
Federal Reserve Bank of San Francisco

Pay to the order of any Bank or Banker or through the Portland Clearing House Assn.
All prior endorsements guaranteed
Oct 30, 1934
24-1 Portland Branch 24-1
Federal Reserve Bank of San Francisco

Pay to the order of any Bank or Banker or
Trust Co.
All prior endorsements guaranteed
24-6 Oct 30 1934 24-6
The Bank of California, N. A.
Portland, Oregon

GOVERNMENT'S EXHIBIT 3

"The Mercantile Bank & Trust Co. No. 53927
82-22

Boulder, Colo. Sept. 12 '34

Pay to the Order of Clara E. Allen $500.00
Five Hundred Dollars.....Dollars
To United States National Bank
23-14 Denver, Colorado

W. E. GRAZZU,
Cashier.

(Endorsed on back) Pay to the order of
Dr. H. J. Miles
Miss Clara E. Allen
Dr. H. J. Miles
Joe Mazurosky [110]

Pay to the Order of Any Bank or Banker
The United States National Bank
Portland, Oregon
All prior endorsements guaranteed
Coll. No. 283427
27 Sept 1934
Paid
Denver Branch Federal Reserve Bank. All prior endorsements guaranteed.

GOVERNMENT'S EXHIBIT 4

"The First National Bank 98-147
Kennewick, Wash., Sept. 20, 1935

Pay to the Order of J. C. Adams $500.00
Five Hundred and no/100 Dollars

H. F. BELTER

No. 345 (Safe Deposit)
(Boxes for)
(Rent)

(Endorsed on back) J. C. Adams Joe Mazurosky

Pay to the order of Any Bank, Banker or Trust Co. All prior endorsements guaranteed.

24-6 Sept 20 1935 24-6
Bank of California, N. A.
Portland, Oregon.

Pay to the order of any Bank or Banker or through the Spokane Clearing House. All prior endorsements guaranteed. Sept. 21, 1935

28-1 Spokane Branch 28-1
Federal Reserve Bank of San Francisco

Pay to the order of any bank or banker or thru the Portland Clearing House. All prior endorsements guaranteed. Sept. 20, 1935

24-1 Portland Branch 24-1
Federal Reserve Bank of San Francisco

Pay any Bank or Banker. All previous endorsements guaranteed.

24-6 Sept 27 1935 24-6
The Bank of California, N. A.
Portland, Oregon

GOVERNMENT'S EXHIBIT 5

"District No. 12 Member Federal Reserve System.

Farmers & Merchants Bank 98-186
Rockford, Wash. Dec 6 1935 No.....
Payment stopped.

Pay to the order of J. C. Adams $300.00
Three Hundred and no/100 Dollars
E. C. DEILIERA

N. P. 24-8"

(Endorsed on the back J. C. Adams Joe Mazurosky

Pay to the order of any Bank or Banker or through the Portland Clearing House. All prior endorsements guaranteed. Dec. 7 1935
24-1 Portland Branch 24-1
Federal Reserve Bank of San Francisco

Pay to the order of any Bank or Banker or Through the Spokane Clearing House. All prior endorsements guaranteed. Dec 9 1935
28-1 Spokane Branch 28-1
Federal Reserve Bank of San Francisco [111]

GOVERNMENT'S EXHIBIT 7

"98-37

Vancouver, Wash. Nov. 14 1925

Washington Exchange Bank Payment stopped.

Pay to the Order of O. A. Plummer $500.00

Five Hundred 00/100 Dollars

Exactly Five Hundred Dollars Exactly Exactly

HENRY WAGNER

Good for $500.00 When properly endorsed 12

Lloyd DuBois

P. M. Nov 18 1925

(Endorsed on back) O. A. Plummer Henry Wagner O. A. Plummer Joe Mazurosky

Cancelled

O. A. Plummer

C-15297

786 Kearney St.

Be 5581

GOVERNMENT'S EXHIBIT 8

Savings Deposit

Savings Account No. 21630 Balance $2594.84

Deposited with

The Bank of California

National Association

Subject to conditions below

By Joe Mazurosky

Portland, Ore., Oct 30 '34

City items credited subject to actual payment. Checks on this bank will be credited conditionally and if not found good at the close of business the

day of deposit, they will be charged back to depositor and the latter notified. Checks on other banks in this city will be carried over for presentation the following day. In receiving out of town items for deposit or collection this bank acts in all cases as the agent of the depositor and it and its collecting agents may accept cash or bank draft in payment of such items and shall not be answerable for items lost in transit or for any act or default of any bank who may receive such items for collection either directly or indirectly, and shall only be held liable when the item has been paid by the drawee, and proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items for which actual funds or solvent credits have not been received by this bank may be charged back to the depositor's account.

		Dollars	Cts
1. Federal Reserve Bank			
2. Canadian Bk. of Com.	Currency		
4. First National Bank	Silver		
6. The Bank of California, N. A.			
11. U. S. National Bank.			
Checks as follows		450	00

Savings Teller No. 2,

Oct 30 1934 24-6 Oct 30 '34 LW 2,144.84

[112]

GOVERNMENT'S EXHIBIT 9

Return to The Bank of California, 24-6
National Association
Portland, Oregon.

Report By our No. 68646

Date 9/27/35

Receipt of the following is acknowledged.
By First Natl Bank Kennewick Wn
Payer Yourselves By H F Belter

Joe Mazurosky 202 N W 6th Ave
Cr. Sav.

Protest No Date 9/20 Due Dmd
Amount 500.00
.50 Ex

499.50

Comments and special instructions
Please Hold for a few days if necessary
Remit in Portland Exchange

Signature J

First National Bank Sept 28, 1935 Paid
Kennewick, Wash.

Credit Country Collection Department

The Bank of California, 24-6
National Association
Portland, Oregon

Date 9/27/35 No. 68646

First Natl Bank Kennewick Wn
Credit to Joe Mazurosky 202 N W 6th Ave
21630

Cr. Sav.

Payer Yourselves by H F Belter

Protest No Date 9/20 Due Dmd
Amount 500.00
Cost us .50

499.50

Documents and special instructions
Please hold for a few days if necessary
Remit in Portland Exchange
Sept 30 '35 2,245.62

Paid and credited to your account
Sept. 30 1935
The Bank of California, N. A.
Portland, Oregon.

Department Record File Under No. 68646

The Bank of California, 24-6
National Association
Portland, Oregon

Date 9/27/35

We enclose for collection
Collecting Bank First Natl Bank
Kennewick Wn

Depositor Joe Mazurosky 202 N W 6th Ave
Cr. Sav.

Payer Yourselves by H F Belter
Protest No. Date 9/20 Due Dmd
Amount 500.00
Cost us .50

499.50

Documents and special instructions
Please hold for a few days if necessary
Remit in Portland Exchange

Paid and Credited to your Account Sept 30, 1935
The Bank of California, NA
Portland, Oregon

[113]

GOVERNMENT EXHIBIT 11

98-147 12

The First National Bank

Kennewick, Wash., Sept 28 1935 193 No. 40246

Pay to the Order of The Bank of California, N. A., Portland, Oregon $499.50

First Nat'l. Kennewick $499 and 50 cts
To The First National Bank
24-4 Portland, Oregon.

JAY D. BLISS
C Cashier

(Endorsed on back) Received payment thru Clearing House 24-6 Sept 30 1935 Portland Oregon The Bank of California, N. A. Collection Sept 30 1935 Department

---

GOVERNMENT EXHIBIT 15

9/23/34

Recd from Miss Clara E. Allen Five Hundred eighty seven ($587.50) in full payment of acct. due Dr. H. J. Miles Recd. by J. J. Carson 710 Republic Bldg Denver

GOVERNMENT EXHIBIT 26

Farmers & Merchants Bank 97-186
District No. 12 Member Federal Reserve System
Rockford, Wash. Dec 6 1935 No.....

Payment stopped

Pay to the Order of J. C. Adams $300.00
Three Hundred and no/100 Dollars

E. C. DEIBERT

N. P. 24-8

(Endorsed on the back) J. C. Adams Joe Mazurosky

Pay to the order of any bank or banker or through the Portland Clearing House All prior endorsements guaranteed Dec 7 1935
24-1 Portland Branch 24-1
Federal Reserve Bank of San Francisco

Pay to the order of any bank or banker or through the Spokane Clearing House All prior endorsements guaranteed Dec. 9 1935
28-1 Spokane Branch 28-1
Federal Reserve Bank of San Francisco

[114]

GOVERNMENT EXHIBIT 27

Savings Deposit

Savings Account No. 21630 Balance $2745.62
Deposited with The Bank of California National Association Subject to the conditions below.

By Joe Mazurosky Portland, Ore. Sept 20 '35

(Conditions, beginning with words "City items credited" and ending with words "Back to the depositor's account" exactly the same as on Exhibit 8.)

		Dollars	Cts
1. Federal Reserve Bank			
2. Canadian Bk. of Com.			
4. First National Bank	Currency		
6. The Bk. of California, N. A.	Silver		
11. U. S. National Bank	Checks as follows		
	98-147	500	00

A

92

Sept 20 '35 2,245.62

GOVERNMENT EXHIBIT 28

Savings Deposit

Savings Account No. 21630 Balance 2500.12
Deposited with The Bank of California National Association Subject to the Conditions below

By Joe Mazurosky
Portland, Ore. Dec. 6 '35

(Conditions, beginning with words "City items credited" and ending with words "Back to the de-

positor's account'' exactly the same as on Exhibits 8 and 27)

1. Federal Reserve Bank
2. Canadian Bk. of Com.
4. First National Bank Currency Dollars Cts.
6. The Bk. of California, N. A. Silver
11. U. S. National Bank

Checks as follows

98-186 300 00

92

A

6 '35 2,200.12

GOVERNMENT EXHIBIT 29

Entered By A

Savings Department Withdrawal

New Balance $2,245.62

Portland, Oregon Sept 20 1935

Received from The Bank of California, Portland, Oregon Five Hundred Dollars, $500.00

Sept 26 '35 92

Account No. 21630 Joe Mazurosky

No payments will be made without the pass book

[115]

GOVERNMENT EXHIBIT 30.

315

Subject to conditions printed on back hereof, this receipt must be returned to bank.

Not transferable.

The United States National Bank
Portland, Oregon

$500.00 Duplicate 9/25/34

Received for collection for account of Joe Mazurosky.

Address: 202 N. W. 6th

Item Draft U. S. Natl Denver Colo.
283427

Instructions Air Mail Wire fate Rush

The United States National Bank
Per Gunty
Teller

The undersigned hereby agrees to the terms and conditions of this receipt.

Joe Mazurosky,
Signature of Owner

(on back) Important Notice

In receiving items for deposit, credit, or collection, the bank acts only as depositor's collecting agent, and assumes no liability for the insolvency or negligence of its direct or indirect collecting agents, nor for losses in transit, and each such agent selected shall only be liable for its own negligence.

All items are credited conditionally, at time of deposit, and for the convenience of the depositor, and may be sent directly or indirectly to the bank upon which they are drawn, and the bank may accept from any drawee bank, or collecting agent, an exchange draft or credit therefor, as conditional payment in lieu of cash, and the bank will only be liable when the proceeds in actual funds, or solvent credits, come into its possession. The bank may charge back any item at any time before ultimate payment, whether returned or not; also any items drawn on the bank not good at the close of business on the day deposited." Past due payments shall be accepted unless instructed in writing to the contrary. It is the Bank's present intention to send the debtor periodical payment notices, but it shall not be liable for failure, inadvertent or otherwise, to send any such notice or notices.

Letter to D/A Boulder Colo 11/3/35

GOVERNMENT EXHIBIT 31.

Collection No. 21018
Department. Portland, Ore. Sept. 27 1934

24-11 United States National Bank

Pay to the order of
Joe Mazurosky $498.60
Four Hundred ninety eight and 60/100.....Dollars

T. F. DUNN,
A Cashier.

Countersigned:
Edwin Hallwyler
Teller

Not negotiable
This Check for use only between departments within this bank. [116]

(endorsed on back) Joe Mazurosky
O K Genty.

GOVERNMENT EXHIBIT 32.

The Western Union Telegraph Company
Incorporated
Money Order Message

1936 Jul 7 A M 10 54
Number 4 AB Check 13 Office from: Portland, Org.
July 7 1936 1049a
MOD (stamp indistinguishable)
Butte Mont
Agony Dream fifty cents to R E Terrell will call WU Joe Mazurosky
(sig.) MOD
Time 1053 A

Not to be transmitted
202 NW 6th Be 5766 smr tqr

GOVERNMENT EXHIBIT 33 387.50

Western Union Money Order Amount 387.50

No. 407 Money order charge 1.60

Time filed 7604 Telegram tolls .97

Received by #258 .05

Sent by 07 Total 390.12

Subject to the conditions below and on back hereof, which are hereby agreed to.

July 7 1936

PR Portland Oreg. Jul 7 1936 AB

Pay to R. E. Terrell

W.C.

Street address Western Union

Place Butte, Mont

Amount Three Hundred eighty seven and 50/100 Dollars and ..... cents ($387.50)

(A message, to be delivered with the money, costs but a little more and saves a separate telegram. It may be written on the following lines)

Message to be delivered with the money:.....

Signature JOE MAZUROSKY

Sender's Address for reference 202 N. W. 6th Ave.

Sender's Telephone Number Be 5766

Positive evidence of personal identity is not to be required from the Payee, and I authorize and direct the Telegraph Company to pay the sum named in this order at my risk to such person as its agent believes to be the above named Payee unless the following is signed:

Positive personal identification required. I desire that the above named payee shall be required to produce positive evidence of personal identity before payment is made.

Signature.....

GOVERNMENT EXHIBIT 34

Money Order Message

Postal Telegraph—Cable Company

No. 12 Check 16 Transfer

(office) Portland, Oregon, Oct. 20, 1934.

To Transfer Agent
at Seattle, Washn. E 117 217 EA

(guardword) Relax (Name of payee) R. E. Terrell (address of payee) care Postal Telegraph Seattle (Code word for amount) Desting DaleAges Submit Seal

(from—name of sender) Joe Mazurosky

	195.92
	.43
100.00	1.10
90	197.45
5.90	OT
2	

No. 54. 195.92 (202 N. W. 6 Ave.) [117]

By Mr. Biggs:

Now, if it please the Court, the defendant at this time moves the Court for its Order directing a verdict of not guilty as to each of the counts of the indictment. Does the Court want me to proceed?

The Court: I think you had better rest your case first.

Mr. Biggs: Very well. That is preliminary to the motion. The Government having rested and the defendant at this time resting, moves the Court for its order directing a verdict of not guilty as to each of the counts in the indictment, on the ground and for the reason that there is no substantial evidence sufficient to submit to the jury which establishes or tends to establish the connection of the defendant with any scheme or artifice to defraud, or the particular scheme or artifice to defraud described and set forth in each count of the indictment, or the use of the mails pursuant to said scheme, there being no conscious participation of the defendant in such scheme. With respect to the count of the indictment relating to the defendant's alleged connection with Roy Martin, John Gray, and others, for the further reason that there is no testimony whatsoever connecting the defendant with any criminal device, scheme, intent, or plan on their part, all of the testimony admitted being the testimony of acts or declarations of alleged co-conspirators, and there is an inadequate prima facie showing of a conspiracy.

The Court: Which count is that, now?

Mr. Biggs: That is Count 1 of the indictment, Your Honor, and also Count 7 of the indictment, being the conspiracy count, and for the further ground that there is no substantial evidence that the United States mails were used by the defendant voluntarily or involuntarily or at all in connection with this.

Thereupon the following proceedings were had:

The Court: The Court at this time denies the motion for a direct verdict as to Counts 4, 7 and 8 of the indictment, and grants the motion as to Counts 1, 2, 3, 5 and 6.

Mr. Biggs: Does the Court desire a verdict to be prepared on those counts?

The Court: No, it can be included in the general verdict.

Mr. Biggs: And may we have an exception to the Court's ruling as to Counts 4, 7 and 8 of the indictment?

The Court: Yes. [118]

(Thereupon the matter was argued to the jury by counsel for the respective parties, and at the close of argument the Court instructed the Jury as follows:)

The Court: Gentlemen of the Jury, you have now heard all of the evidence and the arguments of counsel in the case of the United States of America against Joe Mazurosky, defendant, and it is now my privilege and duty, Gentlemen, to outline for you the principles of law upon which these matters

are to be determined and the guilt or the innocence of the defendant as to certain charges of this indictment decided.

I appreciate very much the temper of this jury as to the fact that the Court has found it necessary to confine you during the course of this trial and keep you away from your ordinary occupations and pursuits. The Court felt it was necessary to do that in the discharge of its duty. I am much pleased, Gentlemen, to note that you have accepted it in good part and with full consideration of the fact that it was as unpleasant for the Court to do it as it was for you to remain confined.

I have noted also with a great deal of pleasure the fact that you have followed this voluminous evidence and the ramifications of these transactions with great interest, and it is with entire satisfaction that I now submit the issues of fact to you for determination.

There are many things which enter into the trial of a criminal case which are not in themselves evidence, and it is upon the evidence alone, subject to the rules of law, that you are to make a determination.

In the first place, there is the indictment in the case. The indictment is a formal charge of crime returned by the grand jury of the United States in order to advise the defendant of what charges are made against him, but the grand jury has no function to determine the truth of the charges; it simply sets out the charges in the indictment, and

then the plea of not guilty puts in issue these charges, and the truth of the matter is for you to try, therefore, although you find positive statements in the charges of the indictment you cannot accept them as true until they have been proven beyond a reasonable doubt and there is no inference to be drawn from the fact that an indictment has been returned or that its language is positive that the defendant is guilty of the crimes charged therein.

The function of the judge and the function of the jury in the trial of a case [119] are entirely different and distinct. It is your sole and exclusive duty to pass upon the questions of fact. It is the duty of the Court to rule upon matters of law and to instruct you as to the rules of law that are to be applied in determining the issues of fact. A Federal judge further has the power of summing up the evidence and of indicating to you the connection of the evidence with the charges in the case and the credibility that may be extended to the witnesses. If I do sum up the evidence in this case, Gentlemen, or if I indicate to you in any manner what my opinion as to guilt or innocence is or the credibility of any witness in this case, I want you to remember that you are the sole and exclusive judges of the facts in the case and that although you may know my opinion you are not bound by it in any degree whatsoever.

The rules of law which I lay down for you are final and binding. There are means whereby if I make a mistake as to the rules of law, that error

can be corrected by a higher court, but as between the jury and the judge the rules of law as laid down are final and binding and you must follow them.

Counsel have made arguments in this case and there have been various arguments as to admission of testimony. Whatever counsel say, whether it is in argument to the Court or in argument to you, it is not testimony or evidence. Counsel are officers of the court, they are under a duty to fairly try the case, and this case on both sides has been fairly and ably tried, but the arguments they make to you and statements made in argument are not evidence and insofar as they suggest to you what the rules of law are, those are not binding upon you either.

It is your function and duty to weigh the evidence and take your own memory of what the evidence was and apply that according to the rules of law laid down to you by the Court. The counsel are not witnesses and you are not bound to follow any inference or deduction to be drawn from the testimony which you remember.

Now the defendant in this case has been indicted by the grand jury upon eight counts. The first six of those counts relate to what are called substantive crimes, using the mails to defraud. The last two counts relate to alleged criminal conspiracies. To each of these counts the defendant has pleaded not guilty, and that plea of not guilty as to each count puts in issue all of the material allegations of the

count. Each count charges a separate crime and must be considered separately [120].

In a criminal trial all of the presumptions are in favor of innocence, and in this case as to each count of this indictment the defendant is presumed to be innocent unless and until proven guilty to your satisfaction on the particular count beyond a reasonable doubt. This presumption follows the defendant throughout the trial and up to such point, if ever, as I said before, that it is overcome by evidence to your satisfaction and beyond a reasonable doubt.

The Government is so bound to prove each material allegation of the indictment, and as these counts relate to separate crimes, before conviction can be obtained must so prove each material allegation of each count before a verdict of guilty could be brought in as to that count.

As to all the counts of the indictment, these material allegations are, first that there has been a crime committed as charged in the particular count; second, that the defendant is the person or one of the persons who committed the crime; and third, that the crime, if any, was committed in the State and District of Oregon. As to that particular feature I charge you under the rules of law that there is sufficient connection charged between the crime, if any, and the State and District of Oregon, so you need to pay no further attention to that.

As to the substantive offenses charged in Counts 1 to 6, the Government must prove that there was a

scheme or artifice to defraud and known to the defendant and that the defendant at the time he received the particular check mentioned in the indictment, intended to participate therein and intended specifically to make use of the United States mails in regard thereto, and further, that the United States mails were made use of in pursuance of the fraudulent scheme.

As to the conspiracy counts, the Government must prove that the defendant conspired or confederated or agreed as charged in the particular count of the indictment to violate the section of the statutes of the United States set out in the indictment, that being the section of the statute relating to using the United States mails to defraud.

It is not necessary that the government prove that the crime was committed on the exact date named in the indictment. It is sufficient if it would be proven that the crime was committed at any date within three years prior to the date of the finding of the indictment, and as far as a conspiracy is concerned, that the conspiracy [121] existed within some time within three years prior to the date of the finding of the indictment and even though formed before, it was still in existence during that time, and that during that time the defendant participated in it, if you find he did at all.

I have used the term "reasonable doubt", which I shall now define. The term "reasonable doubt" means such a doubt as may occur in the mind of an ordinary, reasonable, prudent man after a full, fair,

and complete examination of all the facts and circumstances of the case. It must not be a captious or mere possible doubt inconsistent with the evidence which the jury credits and believes, but such a doubt as in the graver and more important affairs of life would cause the ordinary, reasonable, and prudent man to pause and hesitate before acting upon the truth of the matter charged. Absolute demonstration is not required, that is, proof to a mathematical certainty, because such proof is rarely attainable. Moral certainty alone is required, or that degree of proof which produces conviction in an unprejudiced mind.

It is made a violation of the statutes of the United States for one or more persons to conspire, confederate, or agree together to commit any offense against the United States where one of said persons, pursuant to the unlawful agreement, conspiracy, or confederation, does an overt act, that is, an act reasonably intended to assist in carrying out the unlawful agreement and intent.

The statutes of the United States also provide—and this section of the statute is involved in the conspiracy counts:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing,

circular, pamphlet, or advertisement, whether addressed to any person residing within or outside of the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the [122] United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be guilty of a crime."

Now as I have said before, that is the basis of the substantive charges, Counts 1 to 6, and is also the basis of the conspiracy charge because it is definitely charged in each conspiracy count that the conspiracy or agreement was to violate a particular law of the United States, in other words the law which I have just read to you relating to use of the mails to accomplish schemes to defraud.

Now in this case the Court is at this time directing you to find a verdict for the defendant upon Counts 1, 2, 3, 5 and 6 of the indictment because the Court does not find substantive proof upon which you could find under those counts of the indictment that any letter or matter was positively sent through the United States mails. There was proof of the custom of the banks relating to such matter upon a

certain date, but the Court could not determine that the particular matter went by United States mail. The United States has the burden of proving every material allegation and I do not find that that allegation as to those particular counts was proven, therefore on each of those particular counts I direct you to find a verdict of not guilty. That will be placed upon the verdict under the direction of the Court so that there will be no question about where the responsibility lies, Gentlemen, as to that.

As to Count 4 of the indictment, that is charged as a substantive offense of the same type and there was testimony from which you might, if you found it proven beyond a reasonable doubt, find that a letter was mailed in accordance with the charge of that indictment. Therefore I submit that count for your determination without any suggestion upon my part as to which way you find upon the matter charged. You will remember that the charge of that particular count related to a check which was obtained from one H. F. Belter. You have heard the circumstances as to how it was obtained. The basis of this transaction relates to a check drawn by J. C. Adams on September 20th, 1935 for the sum of five hundred dollars, signed H. F. Belter and bearing the endorsement of Joe Mazurosky. The previous counts of the indictment relate to the transmission of this check, and as I have said before, I find no proof of the mailing of this check which is sufficient to submit for your consideration, but this lays the [123] foundation for the charge contained in Count

4 of the indictment. This is Government's Exhibit 4. The particular count is based upon the mailing of another check transmitting the proceeds, according to the testimony, from the First National Bank of Kennewick, Washington to the First National Bank of Portland, Oregon. It is a check for $499.50 dated September 28th, 1935 and signed by J. L. Bliss, Cashier. That is Government's Exhibit 11.

Now you must find beyond a reasonable doubt before you can bring in a verdict of guilty upon this count that the defendant had some knowledge of the fraudulent scheme which was perpetrated upon Belter, according to the uncontradicted evidence, and that he participated therein and intended by his participation to use the United States mails. He need not directly have posted the letter himself if that was in his contemplation that the United States mails would have to be used by innocent persons to carry out his intent, and of course the bankers in this case are shown by the uncontradicted evidence to have been entirely innocent of these schemes to defraud, so therefore you must take the picture of Joe Mazurosky at the time that he deceived and endorsed this check and find out what his intent and purpose was at the time, and then determine whether or not he intended the United States mails to be used by innocent persons in consummating the scheme, and finally determine whether or not the United States mails were actually used in consummation of the fraudulent design.

You must carefully segregate from your consideration in that regard the other transactions which relate to the conspiracy. They have no relation, and even if you should find that he was engaged in some other conspiracy that does not necessarily mean that he had knowledge of this particular fraudulent scheme, and you must take into consideration who the persons were involved in it, what knowledge, if any, he had of them or of their transactions, and determine from that what knowledge he had and likewise what intent he had.

I will hereafter revert to the question of circumstantial evidence, and I might as well refer to it now. There can be no crime without a criminal intent, but a person is presumed to intend the ordinary, reasonable consequences of any act which he voluntarily does. Intent cannot be established in this case—or knowledge either, for that matter—by direct evidence. The evidence upon which you must always in a criminal case determine intent where intent is required is circumstantial, and [124] in weighing circumstantial evidence I say that before you can base a conviction upon circumstantial evidence alone the circumstances must be inconsistent with every reasonable hypothesis except that of guilt. That is applicable not only to this particular count, but to all the counts of the indictment.

Now then, it has been suggested in argument that the defendant did what he did in good faith as a friend and a business acquaintance of the persons who were shown to have concocted the fraudulent

scheme and that he had no knowledge whatsoever that there was any false or fraudulent scheme in connection with the check or that the acts which he performed operated in furtherance of the scheme. That of course, Gentlemen, is a theory which is for your determination and your determination alone. The issue is whether or not at the time Mazurosky received the check, Exhibit 4, he knew that the same had been delivered in connection with a particular scheme to defraud and that the acts which Mazurosky did and performed in connection with receiving Government's Exhibit No. 4 and in subsequently receiving Government's Exhibit 11 were acts in furtherance of the scheme to defraud, it being essential that the government as part of the case against the defendant Mazurosky establish beyond a reasonable doubt that at the time Mazurosky performed these acts he had guilty knowledge of the nature of the transaction in which he was engaged and the acts which he performed were in furtherance of the alleged scheme to defraud. In determining whether or not at the time Mazurosky received the check and the proceeds thereof and at the time that he received Government's Exhibit 11 he had guilty knowledge of the transaction you are to view the matter as it appeared to Mazurosky at the time with the knowledge that he then had as to the particular persons in that particular transaction and not in the light of other facts or circumstances, if any, which were thereafter brought to his knowledge through subsequent developments.

If the evidence before you establishes beyond a reasonable doubt that at the time Mazurosky received the check, Government's Exhibit 4, and performed other acts in connection with its collection and at the time that the mails were used—if they were used—he knew there was a scheme on foot to defraud and nevertheless performed said acts he was guilty of participating in the scheme, although the evidence may show that he did not know all the details in respect to the scheme. If on the other hand in receiving and handling the check he merely reposed trust and confidence in the transmitter which was violated he is not guilty of having participated in the scheme [125] to defraud, however unjustified he may have been in reposing trust or confidence in that person. Mere carelessness or negligence in trusting or having confidence in other people, however great the carelessness or negligence may be, is not sufficient to constitute a crime such as that charged in the indictment, but if the evidence convinces you beyond a reasonable doubt that Mazurosky knew that the collection of the check or any acts done in connection therewith was in fact in furtherance of a scheme to defraud he could not, by failing to inform himself as to the details of the scheme, avoid criminal responsibility if he in fact knew of the scheme and performed acts in furtherance thereof with intent so to do.

The defendant in order to be convicted on this count must have been a party to the use of the United States mail, but the defendant need not actually have posted the letter or letters or even

actually have caused someone else to post a letter. He must, however, have been connected with such use of the mails in some way, either in intent or by act. However, if he knowingly set on foot or aided in setting on foot a series of acts which would probably result in the United States mails being used to complete the purpose intended and the mails were thereby used he thus caused the use of the mails of the United States as contemplated by the acts of Congress upon which the indictment is based.

If the mails of the United States were in fact used by the First National Bank of Kennewick, Washington and the checks were deposited or received without any knowledge on the part of the banks of the alleged fraudulent scheme, nevertheless if the defendant now on trial caused or knowingly aided in causing the checks to be deposited and handled through the bank with knowledge or reasonable belief that the mails would be used in their collection and that the collection of the check and the cashier's check transmitted as a result thereof was a necessary part of the scheme, then the defendant would be responsible for the use, if any, of the mails by the banks, though the banks and their employees were entirely innocent agents in respect to the alleged scheme to defraud.

I think that that completes the consideration of the one substantive count which is submitted for your consideration. I now turn to the conspiracy counts, which constitute Counts 7 and 8 of the indictment. [126]

In Count 7 the defendant is charged with conspiring, combining, confederating, and agreeing with

Roy L. Martin, and it gives his aliases, Herbert C. Crangle, and his alias, John M. Gray, who you will remember was the witness on the stand, and Thomas A. Andrews. Now the charge of the indictment is that the conspiracy was to commit offenses against the United States, to use the United States mails to defraud in violation of Section 338, Title 18, U. S. C. A., which is the section which I read to you at the beginning of this instruction, Gentlemen, and that the scheme to defraud is that which is set up in the other counts of the indictment, and I need not review that to you; then that there were certain overt acts, and you will note that some of the overt acts relate to the Allen check or the money given by Clara E. Allen, a cashier's check in the sum of five hundred dollars on the Mercantile Bank & Trust Company of Boulder, Colorado. You have heard all the evidence in that connection, Gentlemen. They also relate to the transaction with Christine M. Mershon which was the basis of one of the other counts of the indictment which the Court has taken away from you.

The second conspiracy count relates to conspiracy between the defendant and other persons. It therefore is a separate conspiracy which is charged, and in that charge it is alleged that the defendant conspired, combined, confederated, and agreed with Frank Faircloth, whom you saw on the stand as Nelson, according to the testimony, and William H. Londergan, Jr. The conspiracy in this case is alleged to be to use the United States mails to defraud in violation of the section which I read to you and

this particular matter relates to the charges which were set up in Counts 2, 3, 4, 5, and 6 of the indictment, that is, with relation to the transaction with H. F. Belter.

Now it is necessary for me, Gentlemen, to define to you what a conspiracy is, or what these words "conspire, confederate, combine, and agree" mean. A conspiracy is defined as follows: A conspiracy means a combination of two or more persons by concerted action to accomplish a criminal purpose, and it exists when there is a combination or agreement or understanding, express or implied or tacit between two or more persons for the purpose of committing an unlawful act. It is sufficient to establish a conspiracy that two or more persons in any manner, [127] expressly or silently, come to an understanding to accomplish an unlawful design. Proof of a formal agreement between the parties is not essential to the formation of a conspiracy. Persons entering upon criminal conspiracy do not ordinarily put their agreements in writing, nor do they ordinarily enter into any formal contract or undertaking. The agreement or understanding may be determined from their conduct, what they say, what they do, and in this case you must determine from all that whether there was a concerted action between the persons charged, or some of them, for the accomplishment of an unlawful purpose, and if so that proof would be sufficient to establish the conspiracy. It is not necessary that either or any of the conspirators, if you believe them to be such, should admit that such an agreement or design

existed or that it was for an unlawful purpose or with an intent to commit an offense against the United States. All these things must be determined by you by looking at the conduct, the association together, if any, the relationship as disclosed by the testimony. It is sufficient if you find a concert of action which shows an unlawful design upon the part of any two to commit an unlawful act by legal means or to commit a legal act by illegal means. It is enough if it appears that there is a concert of action of the parties working together understandingly with a common design and for the purpose of accomplishment of a common purpose, and this is true whether each co-conspirator had knowledge of all the details of the conspiracy or the means used, but the conspiracy must be for the purpose either of doing a lawful act by illegal means or an illegal act by lawful means. The material question is whether they did, acting in concert, attempt and agree or combine to accomplish a common purpose of this type, and if so, then they would all be guilty, regardless of the particular part that each was to take in the conspiracy, if any. Direct proof of the organization of a conspiracy is not necessary. It may be inferred by the jury from the facts in the case.

However, the proof of conspiracy is not sufficient alone for conviction. The parties may have had such a design or agreement, but if none of them did anything to carry it out there could be no conviction for conspiracy; in other words, if you should come to that point then the Government would still have to go further and prove that there was an overt act

and one of the overt acts alleged in the particular count of the indictment which was done in pursuance of the unlawful [128] design and was reasonably effective toward carrying it out. The Government, however, does not have to prove that all of the overt acts alleged in either count of the indictment were done, but as to each particular count you must first find beyond a reasonable doubt that the conspiracy existed, that the defendant was a member, and that one of the overt acts was done.

There must of course be two parties to a conspiracy. An individual alone cannot be guilty of conspiracy. In order to constitute conspiracy there must be unity of action or opinion. Both parties must intend to accomplish the same criminal act. After the formation of the conspiracy and during the existence of the conspiracy the act of a member thereof, one of the parties to the agreement, is then the act of all who at the time are acting in concert with the common thing in view. If a person becomes a member of the conspiracy under these rules he then remains a member up to the time that the unlawful conspiracy ceases, that is, until the acts are either accomplished or fail of accomplishment or until he by affirmative act upon his part retracts his membership and agreement and withdraws.

Now under this indictment, however, it is not enough that the conspiracy be directed to the attainment of some unlawful object by unlawful means. It must be directed to the attainment of the particular object specified in the indictment, namely, in this case as is charged, the carrying out of the scheme

to defraud certain people as alleged in the indictment, and further, there must be an agreement that the unlawful means were to be used and that those unlawful means used were in violation of the statute against the use of the United States mails to defraud. If you should believe from the evidence in this case that there was an agreement that the defendant should cash any checks sent to him without any knowledge upon the part of the defendant that the checks were to be the fruits of the particular fraud alleged in the indictment, then as to the conspiracy counts you would have to find a verdict of not guilty, even though you believed the defendant knew or had reason to believe that the checks were obtained in some illegal manner.

Even though the defendant knew or ought to have known that the checks described in the indictment were obtained from the particular illegal enterprise, but the defendant cashed them with no intent and without previous arrangement or agreement to participate in the particular fraud, but for the purpose of either obtaining [129] repayment of money due him by the sender or senders of the checks or for a commission, but you do not find any agreement to participate in the fraud, then your verdict on the particular conspiracy count will be not guilty.

Cashing checks for a commission or percentage of the proceeds, or for any other monetary consideration, is not in itself a crime. As regard the conspiracy counts, there must be in addition, an intent and purpose in cashing such checks to do or assist in carrying out the fraudulent scheme or design of

which the checks are the proceeds and to participate in an agreement, express, implied, or tacit, to that effect, and therefore if you are not convinced by the evidence that the defendant entered a conspiracy intending to aid in the perpetration of a fraud when he cashed the checks, even though you should believe beyond a reasonable doubt that he knew that the checks were obtained in some illicit enterprise, your verdict should be not guilty as to the particular conspiracy count.

Mere knowledge of or acquiescence in the purpose or object of a conspiracy, without any agreement to cooperate or to accomplish such object or purpose, is not enough to constitute one a party to a conspiracy, but if a person does an act with knowledge of the existence of the conspiracy and the act is in furtherance of the criminal design you may take that into consideration in determining whether or not he intended by doing the act thereby to agree to carry out the object of the conspiracy.

Before you would be justified in finding the defendant guilty, you must believe beyond a reasonable doubt that the defendant did something other than to do an act which furthered the object of the conspiracy. The evidence must establish beyond a reasonable doubt before there can be conviction that there was an unlawful agreement and participation therein with knowledge and consent to the agreement upon the part of the defendant, but as I have said before, if the defendant did an unlawful act or an act in furtherance of the conspiracy with knowledge of the purpose and the intent of the

parties thereto you might take that into consideration as to whether the defendant took part in the agreement and by that act intended to join up with the unlawful purpose and design and do the act in furtherance of the design.

It is not necessary that all the conspirators be acquainted with each other. It may be that they have not previously associated together. One conspirator may [130] know only a few of the others, but where one knows that others are acting together to violate the law and intentionally cooperates to further the object of the conspiracy he becomes a party to it, and when men enter into an agreement or conspiracy to accomplish an unlawful or illegal act by unlawful means they become the agents for one another and the act of one in pursuance to a common purpose is deemed the act of all and to make all responsible for the act.

Now Gentlemen, as a whole you have this matter also before you; you understand that the theory of the defense is that Mazurosky was not engaged in any criminal design, that he cashed these checks either without knowledge of the conspiracy or without any intent to participate in any criminal design and simply to further purposes of his own in regard to making money by discounting the checks to a certain amount, knowing that they must have been obtained unlawfully or they wouldn't have been brought to him, or that he did it through friendship of the defendants. On the other hand, you have the circumstances which have been related as to his connection with these parties and certain of these

checks. You have before you certain declarations which have been testified to when investigations were made as to certain of these checks. You may take that all into consideration, Gentlemen, insofar as it relates to either count of the conspiracy and from that you must make up your mind as to the guilt or innocence of the defendant.

The defendant in this case has not taken the stand. That circumstance, however, raises no presumption whatsoever against him in this case. The Government is bound to prove its case beyond a reasonable doubt and it can't ask for any assistance from the defendant. You will try the case from the Government's evidence alone and determine whether or not beyond a reasonable doubt it convinces you of the guilt of the defendant as to each count which I submit for your consideration.

There was certain evidence, Gentlemen, given on the stand as to the transactions which took place which was given by men who, if their testimony is to be believed, were accomplices in this affair of the defendant, in other words they claimed to be co-actors with him in an illegal scheme, and their testimony is to be looked upon with great care and caution. They themselves are involved in these criminal acts and they confess it, and then they tell you about the defendant. Now the only thing I say to you about it is that you should approach that testimony with great [131] care and caution. If in view of the corroboration, if any, that was given or even on account of the attitude of the witnesses on the stand you believe that you can accept their tes-

timony it is proper testimony for your consideration, but you must weigh them and the surrounding circumstances and the amount of corroboration before you can extend to them the credit that is ordinarily given persons who are not claiming to be accomplices.

Likewise certain of these witnesses have admitted that they are under conviction of a felony, and that you may weigh, Gentlemen, in determining whether or not you give to them the credibility that you would to a man who was never previously convicted. The law also says that that is a circumstance to be given great weight in determining the credibility that you give to a witness, whether he has been previously convicted of a crime, because the law says that normally speaking he isn't as entirely credible as a person who has not previously been convicted of a crime. Of course, Gentlemen, the credibility of the witness is for you, and if after looking at him on the stand and considering his testimony and whether there is any corroboration or not you determine that you give him full credit then you may accept his testimony, irrespective of these other matters which I have now suggested to you.

You are the sole and exclusive judges of the facts in the case and of the credibility of all the witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

The testimony of any one witness to whom you give full credit and belief is sufficient to establish any issue in this case. You are not bound to accept

the testimony of any number of witnesses which does not produce conviction in your minds as against the testimony of a less number or against a presumption or other evidence which does convince you.

Every witness is presumed to speak the truth. That presumption, however, may be overcome by the manner in which he testifies, the interest that he may have in the outcome of the case, or by contradictory evidence. You may take into consideration the attitude of a witness on the stand and the character of the things that he is telling. If a witness has testified falsely in any one material part of his testimony, and if you find that a witness has testified wilfully false then it will [132] by your duty to entirely disregard all the rest of his testimony unless it is corroborated by other evidence which you do believe.

Any fact in the case may be proven by direct or indirect evidence. Direct evidence is that which proves a fact in dispute directly, without any inference or presumption as to its existence. The testimony of an eye witness to a transaction is direct evidence. Indirect evidence is also competent, that is, evidence which tends to prove one fact by proving another but which does not necessarily prove the fact but affords an inference or presumption of its existence. As I have said before, that evidence is entirely competent and sometimes is more convincing than direct evidence, but before you can find a verdict of guilty on any count of this indictment where the evidence is entirely circumstantial then it must be inconsistent with every reasonable hypothesis except that of guilt.

There are certain phases of the testimony here which relate to oral admissions of the defendant. That is competent evidence for your consideration; however, that sort of thing must be viewed with great caution. The defendant himself may have been mistaken or the witness may have misunderstood him or may have somehow misreported what the defendant said. Of course if you do find that the admission was made—or the statement was made in the exact words given to you, then you are entitled to give it great weight, because the defendant better than anyone else knows what his connection with this transaction was.

The evidence should be weighed in the light of the evidence which is within the power of one side to produce and the other to contradict, therefore if you find that one party has produced evidence of less weight when it was within their power to produce evidence stronger and better you have a right to look with distrust upon the evidence offered.

I think that fairly sums up, Gentlemen, the rules of law to apply in this case. I have not attempted any summary of the testimony or any suggestion as to how you should find upon any of the issues in this case, but simply have given you the rules of law, and with that I shall submit the case with entire confidence that you will render a fair verdict.

Are there any exceptions?

Mr. Biggs: No exceptions, Your Honor. [133]

Mr. Strayer: There is one matter in the first part of your Honor's charge; if I understood your Honor correctly you instructed the jury before it could find a verdict of guilty on the substantive

count they must find an intent to use the mails, and later on in your charge I think you instructed differently in that regard, and I thought some confusion may have arisen in the jurors' minds as to what the charge was on the substantive count as to the intent to use the mails.

The Court: I think I will not put any great emphasis on that. I think I will submit it just as the instructions were given.

You will have with you in your jury room, Gentlemen, the indictment in this case, the exhibits which have been introduced in evidence, and two forms of verdict. Now Gentlemen, one of these forms of verdict I won't review with you. It simply says that by direction of the Court you find the defendant not guilty on Counts 1, 2, 3, 5, and 6, but it will have to be signed by your foreman at the time you return the other verdict.

The other verdict on the counts which I am submitting for your determination, omitting the formal portions, reads as follows:

"We, the Jury, duly impaneled and sworn to try the above entitled cause, do find the defendant, Joe Mazurosky, blank guilty as charged in Count four of the indictment herein; blank guilty as charged in Count seven of the indictment herein; and blank guilty as charged in Count eight of the indictment herein. Dated at Medford, Oregon, this blank day of March, 1938. Blank line, foreman."

Now, Gentlemen, if you find that the Government has failed to prove beyond a reasonable doubt any one of these counts which I am submitting for your

determination you will fill the word "not" in the blank before the words "guilty as charged" in the particular count, and if on the other hand you find that the Government has proved its case as to any one of these three counts you will leave that blank empty and allow the wording to stand as it is at present as to that particular count.

In any event, Gentlemen, each of these verdicts will be signed by your foreman alone, and since this is a case that is being tried in the Federal Court you must find a unanimous verdict. [134]

The foregoing Bill of Exceptions contains all the material evidence offered and received on the trial of said cause, including all rulings made during the course of trial which were excepted to by the defendant, and exceptions allowed by the Court.

EDWIN D. HICKS
Attorney for Defendant and Appellant. [135]

It is hereby certified that on the 18th day of April, 1938, the Honorable James Alger Fee, based upon stipulation of counsel, and for good cause shown, entered an Order allowing defendant to have to and including the 1st day of May, 1938, for settlement and filing of Bill of Exceptions, and Assignments of Error in respect to the within appeal.

It is hereby certified that the foregoing proceedings were had upon the trial of this cause, and that the Bill of Exceptions contains all of the evidence produced at the said trial.

It is further certified that the foregoing Exceptions asked and taken by the defendant, were allowed by the Court, and that the Bill of Exceptions was duly presented within the time fixed by law and the Order of this Court, and is by me duly allowed and signed this 23rd day of April, 1938.

JAMES ALGER FEE,
Judge of The District Court of the United States, For the District of Oregon. [136]

State of Oregon,
County of Multnomah—ss.

Due service of the within Bill of Exceptions is hereby accepted in Multnomah County, Oregon, this 16th day of April, 1938, by receiving a copy thereof, duly certified to as such by Edwin D. Hicks, of Attorneys for Defendant and Appellant.

J. MASON DILLARD
Attorney for United States of America.

[Endorsed]: Lodged April 16, 1938. Filed Apr. 25, 1938.

[Endorsed]: Filed May 2, 1938. Paul P. O'Brien, Clerk. [137]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Joe Mazurosky, being the defendant in the above entitled cause, and the appellant herein, appearing by Edwin D. Hicks, his attorney, and having filed a

notice of appeal, as required by law, that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and judgment made and entered in said cause against the said defendant herein, now makes and files, in support of said appeal, the following assignments of error, upon which he will rely for a reversal of said final order and judgment upon the said appeal, and which errors are to the great detriment, injury and prejudice of this defendant, and said defendant says that in the records and proceedings, upon the hearings and determination thereof in the District Court of the United States for the District of Oregon, there is manifest error, in this, to-wit:

Assignment of Error No. 1

The Court erred in over-ruling defendant's motion for a directed verdict as to Counts four, seven and eight of the indictment made at the conclusion of the case after all parties had rested, for the reasons therein set forth:

Mr. Biggs: "The Government having rested and the defendant at this time resting, moves the Court for its order directing a verdict of not guilty as to each of the counts in the indictment, on the ground and for the reason that there is no substantial evidence sufficient to submit to the jury which establishes or tends to establish the connection of the defendant with any [138] scheme or artifice to defraud, or the particular scheme or artifice to defraud described and set forth in each count of the indictment, or the use of the mails pursuant

to said scheme, there being no conscious participation of the defendant in such scheme. With respect to the count of the indictment relating to the defendant's alleged connection with Roy Martin, John Gray, and others, for the further reason that there is no testimony whatsoever connecting the defendant with any criminal device, scheme, intent, or plan on their part, all of the testimony admitted being the testimony of acts or declarations of alleged co-conspirators, and there is an inadequate prima facie showing of a conspiracy.

"The Court: Which count is that, now?

"Mr. Biggs: That is Count 1 of the indictment, Your Honor, and also Count 7 of the indictment, being the conspiracy count, and for the further ground that there is no substantial evidence that the United States Mails were used by the defendant voluntarily or involuntarily or at all in connection with this.

"Thereupon the following proceedings were had:

"The Court: The Court at this time denies the motion for a directed verdict as to Counts 4, 7 and 8 of the indictment, and grants the motion as to Counts 1, 2, 3, 5 and 6.

"Mr. Biggs: Does the Court desire a verdict to be prepared on those counts?

"The Court: No, it can be included in the general verdict.

"Mr. Biggs: And may we have an exception to the Court's ruling as to Counts 4, 7 and 8 of the indictment?

"The Court: Yes."

Assignment of Error No. 2

That the Court erred in permitting the witness for the United States of America, Mr. Frank Nelson, to testify as follows:

Questions by Mr. Dillard: [139]

"Q. How did Mr. Wagner happen to give you a check for Five hundred ($500.00) Dollars?

"A. I called on Mr. Wagner at his home——

"Mr. Biggs: Just a moment, the defendant objects to the introduction of any testimony concerning the manner or means or time or place of the taking of that check. It is now shown to be set up in the indictment. It is not the basis for one of the charges made in the indictment; it is dated, as already identified, some thirteen years prior to the indictment and some nine years prior to the date the alleged conspiracy commenced, and therefore is too remote to be admitted under the theory of any similar transactions, if that is what is claimed for it.

"Mr. Dillard: It is offered, Your Honor, to show knowledge on the defendant. It will develop that—well, it is offered to show knowledge.

"The Court: The Court will admit the testimony in view of the matters that have been already testified regarding Government's Exhibit 7.

"Mr. Biggs: May we have an exception to the Court's ruling?

"The Court: Yes.

"Frank Nelson: I came into possession of the Wagner check, Exhibit 7, under the following circumstances: I called on Mr. Plummer at his home, introduced myself as a local optometrist from Van-

couver, Washington, and examined his eyes and told him that he had a trouble that I really didn't understand myself, that he should consult an eye, ear, nose and throat specialist, and I asked him if he knew anybody in Vancouver or Portland that he was personally acquainted with that he cared to go see, and he said that he didn't, so I told him about a party that was with me that was an eye specialist and that if he would go out and ask him to come in that he might give what information he needed, so he did that. I told him my partner (Dr. Brown) was Dr. Ainsworth. He called Brown into the house and Brown [140] performed an operation for him on his eye. At that time we were using the skin of an egg. He put that on the eye and removed it from the eye, and showed it to him and charged him Six Hundred Seventy-five ($675.00) Dollars, I think it was. We got two checks, one for One Hundred seventy-five ($175.00) Dollars, and one for Five hundred ($500.00) Dollars. The one for $175.00, Dr. Brown cashed at one of the banks in Vancouver, Washington. I took the other Wagner check to another bank and he refused to cash it, but the banker certified the check. I am referring now to Exhibit 7 for identification. When he refused to cash the check, I gave it to my partner, Dr. Brown, and from that day until last year I never saw the check any more. Dr. Brown was a friend of Mr. Mazurosky as well as myself. He was the gentleman who had the store next door to Mazurosky's store, the optical store." [141]

Assignment of Error No. 3

That the Court erred in permitting reception into the evidence of Exhibit numbered 7, offered and received in behalf of the United States of America under the following circumstances:

Questions by Mr. Dillard:

Mr. Dillard: If Your Honor please, we will offer in evidence Government's Exhibits for identification 4, 5, 7 and 26.

The Court: Any objection?

Mr. Biggs: If the Court please, the defendant objects to the introduction of these checks on the ground and for the reason that there has been no evidence sufficient to connect the defendant with the manner and method and means by which these checks were taken or for any other purpose, and I assume they would be immaterial if they were not offered for the purpose of connecting the defendant with that transaction; as to Exhibit 7, on the further ground and for the further reason that it is in connection with a transaction occurring more than thirteen years prior to the date of the offer, and upon that ground it is too remote to have probative force.

The Court: All these checks have the defendant's signature and they are admissible in evidence. Admitted. Exception allowed.

(The documents heretofore marked Government's Exhibits 4, 5, 7 and 26, respectively, for Identification were thereupon received in evidence.)

There was thereupon received in evidence, Exhibit of the United States of America, numbered 7, which is in words and figures as follows, to-wit:

GOVERNMENT EXHIBIT 7

98-37

Vancouver, Wash. Nov. 14, 1925

Washington Exchange Bank

Payment stopped.

Pay to the
Order of O. A. Plummer $500.00
Five Hundred 00/100 Dollars
Exactly Five Hundred Dollars Exactly Exactly

HENRY WAGNER

Good for $500.00
When properly endorsed
Lloyd DuBois
P. M.
Nov. 18, 1925

(Endorsed on Back) O. A. Plummer O. A. Plummer
Henry Wagner C-15297
O. A. Plummer
Joe Mazurosky Cancelled
786 Kearney St.
Be 5581 [142]

Assignment of Error No. 4

That the Court erred in permitting the witness for the United States of America, Mr. Henry Wagner, to testify as follows:

Questions by Mr. Strayer:

Q. Mr. Wagner, will you just tell the jury the circumstances under which you made out and delivered that check?

Mr. Biggs: If the Court please, we object to the introduction of this testimony on the ground that it was to do with a transaction in the absence and not in the presence of this defendant, there being no sufficient foundation made connecting the defendant with the transaction or showing knowledge of the transaction.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Exception allowed.

Mr. Biggs: Could a continuing objection to this testimony go on, Your Honor, to prevent the necessity of constant interruption?

The Court: You will have to object to the testimony of each witness.

Mr. Biggs: But it may be a continuing objection?

The Court: As far as the testimony of the particular witness.

Mr. Biggs: Thank you.

There were two men came to my farm on the 14th day of November, 1925, who said they were eye doctors that tried to sell us glasses. I wasn't in need of any glasses, but my brother, William, did need them; his eyes were failing and they examined his eyes and discovered that there was something wrong and finally found it was a cataract—told him it was a cataract, and said that it would have to be removed or else he would go blind, and so he submitted to the operation to remove the imperfection in his eye. Before they did that I asked them what it would cost to remove it and they said it would be nominal, the price would be nominal, and so they

went to work and removed it and when they got through the bill was Seven Hundred Fifty ($750) Dollars.

They had an instrument about a foot long, a sort of rod, and they worked around in his eye with that and removed something that looked like the white of an egg, and they called that the cataract. That was the operation that was performed. [143] These parties were using the names of Dr. O. A. Plummer and Dr. J. C. Ainsworth. Mr. Plummer was a tall, slim man, rather dark, about 35 or 40 I should judge. I believe I saw him today. The other wasn't near as tall, was older, heavy set with a sloping forehead at a conspicuous angle. The older man performed the operation. When they said they wanted $750.00 I objected. They said radium was used to remove the cataract and that the value of the radium used in the operation was Six hundred fifty ($650.00) Dollars. They reduced the bill to Six hundred fifty ($650.00) Dollars and I wrote out two checks, this one and another for One hundred seventy-five ($175.00) Dollars, making a total of Six Hundred Seventy-five ($675.00) Dollars. The checks were handed over to Mr. Plummer. I did not see them after I delivered the checks. One of the checks was *cased,* the $175.00 one. I next saw the $500.00 check at Mr. Dubois' in the bank." [144]

Assignment of Error No. 5.

That the Court erred in permitting the witness for the United States of America, Mr. William Wagner, to testify as follows:

Questions by Mr. Strayer:

My name is William Wagner, brother of Henry Wagner, and we live near Vancouver, Washington. I recognize the check you have handed me, Exhibit 7 for identification.

Q. Do you recall the circumstances under which that check was made out and delivered?

A. Yes, sir.

Q. Will you just tell the jury about it?

Mr. Biggs: If the Court please, for the purpose of the record we object to the introduction of this testimony on the grounds assigned with respect to the testimony of the brother.

The Court: The objection is overruled.

Mr. Biggs: And that will go to all the testimony on the further ground of remoteness?

The Court: Overruled. Exception allowed.

Mr. Strayer: Q. Tell us the circumstances under which your brother made out and delivered that check.

Well, this check was written for eye doctors. There were a couple of them, Plummer and Ainsworth, and they examined our eyes and told me I had a cataract on one of my eyes and if it wasn't removed I would go blind in a short time. It scared me, of course, and it scared my brother, and we issued this check in payment for the operation. The check was made out by my brother in my presence.

The check was delivered to Plummer. The check was never paid. I have seen neither of the men since then. The operation didn't help "one bit." [145]

Assignment of Error No. 6

That the Court erred in permitting the witness for the United States of America, Mr. John M. Gray, to testify as follows:

Questions by Mr. Strayer:

Q. What did Martin tell you as to what he had done with the Merson check?

Mr. Biggs: If the Court please, we object to the witness answering that question on the ground that it would be hearsay, there being no sufficient or any prima facie showing of any partnership in crime or otherwise between Mr. Martin and Mr. Mazurosky, and therefore no sufficient foundation laid for the introduction of any statements, declarations, or evidence of any acts of omission of commission done in the absence and out of the presence of the defendant.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Yes.

A. My conversation with Roy Martin was that he mailed the check to Joe Mazurosky.

Mr. Strayer: Q. And did he tell you anything about the arrangement with Joe Mazurosky?

Mr. Biggs: If the Court please, may we make the same objection and have the continuing objection to any testimony asked for and given by this witness in connection with statements or evidence of facts or declarations on the part of Martin?

The Court: Yes.

Mr. Biggs: I make the same objection at this time, Your Honor.

The Court: The objection is overruled.

Mr. Biggs: And may I have an exception?

The Court: An exception is allowed.

Mr. Strayer: Q. What did he tell you?

A. It would cost me fifteen per cent (15%) to get the check cashed through Joe Mazurosky.

As I previously stated, my arrangement with Mrs. Martin was that she would go down with me to Joe Mazurosky's and we would obtain this money and I would take my part of the money and Mrs. Martin was to keep his part of the money. [146]

Q. And under your agreement with Martin what percentage of the check were you to receive?

A. I received a total of sixty (60%) per cent.

Q. And what was to be done with the balance of the money?

A. Fifteen (15%) per cent would go to Joe Mazurosky for collection, twenty-five (25%) per cent to Martin and Cragle, and sixty (60%) per cent to Nelson and myself.

We were paying Martin and Crangle twenty-five (25%) per cent for advance information concerning these people.

Referring to the time when I received the Mershon check on October 29th, after having a conversation probably one or two days previous to that with Mr. Martin and Mr. Crangle, they told me circumstances of a fake cataract operation on Mrs. Mershon, or Mr. Mershon, one or the other of them.

I went to the home of these people on this date and made an examination of the party that was supposed to be operated on, I don't recall which one now. I remember explaining that I was there for the purpose of giving them back the money in the event that it wasn't cured, that the doctor that operated on them had had an accident of some kind and probably was killed; anyhow, after my examination I told them it wouldn't be cured without the use of a radium belt and explained to them a radium belt was very valuable, only twelve of them in the United States; the doctor that made them had died with the secret. The windup of the conversation was that they deposited this amount of money with me as surety, one of these belts to be delivered to their home and used for a period of thirty days, and that is how I obtained the check.

To my knowledge there was no such thing as a radium belt. There was nothing more the matter with these people than senility or old age. At the time I talked with them I was using the name, Dr. Pierce. I also went by the names of Miles, Hamilton, Howard, Clayton, Cox and others. I understood that the name T. A. Andrews was the correct name of the party who was with me. He also went by the name of Thomas, Judge Thomas, and I so introduced him to the Mershons. I represented Thomas as an attorney, settling the estate of the doctor who had been killed and who had performed the operation on their eyes. Thomas is at this time in a Federal Penitentiary in [147] Virginia. I understand Roy Martin and Herbert Crangle are in the

Federal penitentiary at Atlanta, Georgia. Crangle usually went by the name of Dr. Avery. Martin, when performing the operations, usually was represented as Dr. Miles.

Referring back to the time when I received the proceeds of the Mershon check, I will state that I met Mr. Mazurosky about a week thereafter, for the first time. I was introduced to him by Roy Martin at the St. Andrews Apartment Hotel in Portland, Oregon.

Q. And what were you doing there at the St. Andrews Apartment Hotel?

A. Mr. Martin was living there at the hotel. I was down there to see him and I just met Mr. Mazurosky, that is all.

The Allen check, Exhibit 3 for identification, which you have handed me was received by me sometime in September, 1934. I went to the home of Clara Allen and her brother somewhere around Boulder, Colorado. The Exhibit is a cashier's check.

Mr. Strayer: Q. And how did you receive possession of it?

A. T. A. Andrews and I drove to the home of Clara Allen and her brother, out of Boulder, Colorado, and I talked to Miss Allen and her brother and performed a socalled fake cataract operation on the brother's eye and went to town to get this money. She drove her car and we followed in another car. She didn't have the money in the bank. They had some Liberty bonds and these were at the bank in the name of the brother and she couldn't obtain these bonds, so she had to go back home and

get an order for them, and it was then too late to get the bonds out of the bank that day so I instructed her to go the following day and get the bonds or the cash money and I would be back in a few days to get it, but I didn't. I waited a couple of weeks and I sent Mr. Andrews out there early on Sunday morning. That day he returned with the check and gave it to me. I received the check from T. A. Andrews about twelve or fifteen days after the date noted on the check. I was working with Andrews at that time.

I performed the operation on Miss Andrews' brother. Due to senility, his vision was dim and I explained to him that I could make him see with radium treatment. I dropped a few drops of Murine eye water into his eye and removed a piece of skin that I had—I was supposed to have removed it—and that was all there was to it. He did have a cataract but I did nothing about it. The check was given me in payment for the [148] operation. I was using either the name of Miles or Pierce, I am not sure which. Andrews was using the name of Thomas. Miss Allen's brother received no benefit from the operation. After receiving the check, I gave it to Roy Martin. He told me he could send it to Portland for collection and it would cost me fifteen (15%) per cent. He told me he was going to send it to Joe Mazurosky. He wrote him a letter and put it in an envelope and dropped it in a mail box in Denver, Colorado. After he mailed the letter, I later received the proceeds of the check. Mr. Martin gave me Five Hundred ($500) Dollars less fifteen (15%) per cent, which is Seventy-five ($75)

Dollars, in Seattle—a few dollars less than that because he told me that the money had been wired to him. That was about the first or second week in October, 1934. I went back to see Miss Allen in 1935. When I was there the first time they had two thousand dollars in Liberty bonds and I went back there to get the balance of them if I could. I talked to Miss Allen; found her in the cow pen milking a cow. It was early in the morning. I went in and talked to her and she didn't recognize me. As soon as I began to talk about eyes she told me she had been swindled out of Five Hundred ($500) Dollars and if I would go down town and talk to the district attorney he would tell me all about it, and so that was all I wanted to know and I drove away. She did not recognize me as one of the men who had been there before. I wore no disguise.

(The check, Government's Exhibit 15 for Identification, was thereupon marked.)

The first time I ever saw the exhibit marked Government's Exhibit 15 for identification was at the trial in Portland. I can't say that I recognize the handwriting. When Martin sent the checks to Joe Mazurosky, he used the name of R. E. Terrell. [149]

Assignment of Error No. 7

The Court erred in denying defendant's Motion for directed verdict as to Counts seven and eight of the indictment, in that the evidence adduced at the trial disclosed but one single conspiracy and the defendant cannot be convicted of two conspiracies upon a showing that there was but one conspiracy in existence. [150]

Assignment of Error No. 8.

The Court erred in submitting count seven of the indictment for consideration by the jury for the reason that said count does not state facts sufficient to constitute a crime, in that:

(a) It is not alleged in said count that the use of the United States Mails was a part of and/or was embraced within the terms of the alleged conspiracy therein set forth.

(b) It appears affirmatively from the allegations of said count that said alleged conspiracy did not embrace or include by its terms the use by said conspirators of the United States Mails in furtherance of the scheme to defraud, set forth in said count.

[151]

Assignment of Error No. 9.

The Court erred in submitting count eight of the indictment for consideration by the jury for the reason that said count does not state facts sufficient to constitute a crime, in that:

(a) It is not alleged in said count that the use of the United States Mails was a part of and/or was embraced within the terms of the alleged conspiracy therein set forth.

(b) It appears affirmatively from the allegations of said count that said alleged conspiracy did not embrace or include by its terms the use by said conspirators of the United States Mails in furtherance of the scheme to defraud, set forth in said count.

[152]

Wherefore, the defendant and appellant prays that the judgment in said cause be reversed and the

cause be remanded with instructions to the trial Court as to further proceedings therein, and for such other and further relief as may be just in the premises.

EDWIN D. HICKS
Attorney for Defendant and Appellant. [153]

State of Oregon,
County of Multnomah—ss.

Due service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 20th day of April, 1938, by receiving a copy thereof, duly certified to as such by Edwin D. Hicks, of Attorneys for Defendant and appellant.

J. MASON DILLARD
Attorney for United States of America.

[Endorsed]: Filed April 20, 1938.

[Endorsed]: Filed May 2, 1938. Paul P. O'Brien. Clerk. [154]

[Endorsed]: No. 8809. United States Circuit Court of Appeals for the Ninth Circuit. Joe Mazurosky, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed May 2, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8809

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOE MAZUROSKY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

BRIEF OF APPELLANT

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No. 8809

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOE MAZUROSKY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

BRIEF OF APPELLANT

JURISDICTION

This is a criminal action in which the jurisdiction of this Court and the District Court has been invoked under the provisions of Sections 88 and 338 of Title 18, U. S. C. A., penal statutes of the United States. The action was instituted by indictment of a Grand Jury of the United States States District Court for the District of Oregon.

STATEMENT OF THE CASE

THE INDICTMENT

The Indictment contains eight counts, the first six of which were predicated upon Section 338 of Title 18, U. S. C. A., and the last two upon Section 88 of the same Title. A verdict of not guilty was returned by direction of the Court upon all counts save those numbered 4, 7 and 8, and a verdict of guilty was returned by the jury on said three counts, and Judgment was entered thereon. (R. 41, 42, 43.)

Count IV

This is a substantive Count in which it is charged that on or about the 28th day of September, 1935, the defendant wilfully and feloniously placed and caused to be placed in the United States Post Office at Kennewick, Washington, and sent and delivered to the addressee thereof by the postal establishment of the United States, according to the address thereon, a letter addressed to the Bank of California, at Portland, Oregon, from the First National Bank, Kennewick, Washington, which said letter contained a bank draft drawn to the favor of the Bank of California upon the First National Bank of Portland, in the sum of $499.50. It is alleged that the defendant in combination with one Frank Faircloth and other named parties to an alleged scheme to defraud, had procured, pursuant to said scheme, a check in the sum of $500.00 from one H. F.

Belter and that the defendant, for the purpose of executing said scheme and artifice to defraud, had caused the mails to be used as above set forth.

The alleged scheme is incorporated in this Count of the Indictment by reference to the allegations of Count 2 thereof in which it is alleged that the defendant and his confederates would represent themselves as qualified to treat various diseases of the eye and in doing so would perform fraudulent operations on the eye of the particular party for which substantial charges were made.

Count VII

This is a conspiracy Count in which it is alleged that the defendant conspired with one Roy L. Martin, and others, on or prior to September 12, 1934, to violate Section 338 of Title 18, U. S. C. A., in the use of the United States mails to defraud. The fraudulent scheme is alleged by reference to Count I of the Indictment, in which it is set forth that the defendant and his confederates would represent themselvs as qualified to treat various diseases of the eye and in doing so would prescribe "Radium Water" and "Radium Belts," all of which were fraudulent, and that substantial charges would be made therefor. It is further alleged that it was the intention of the defendant and his co-conspirators that the U. S. mails should be used to effect the objects of said conspiracy. Five overt acts are set forth which

embrace two alleged fraudulent transactions under said conspiracy, to-wit, those which may be styled for convenience of reference, the "Mershon" transaction, and the "Allen" transaction, respectively.

Count VIII

This is a second conspiracy Count under the same Section of the Statute noted for Count 7. The conspiracy is alleged to have been formed on or prior to September 12, 1934. The alleged scheme is the same as that noted in Count 4 of the Indictment, and the violations set forth in Counts Numbered 2, 3, 4, 5 and 6 are incorporated by reference as embraced within the conspiracy and said acts are styled in this Count as overt acts. Four additional overt acts are alleged which include, with those incorporated by reference to Counts Numbered 3, 4, 5 and 6, two alleged transactions which may be conveniently described as the "Belter" and "Deibert" transactions. It is alleged that it was the intention of the defendant and his alleged co-conspirators to use the United States mails in effectuating the conspiracy.

The defendant entered a plea of not guilty to each count of the indictment. (R. 36) The case was tried before the Honorable James Alger Fee, District Judge, and a jury, resulting in a verdict of guilty on Counts Numbered 4, 7 and 8 (R. 40). Judgment was entered on the verdict and sentence was imposed on March 19,

1938 (R. 43). Notice of Appeal was served and filed on March 24, 1938. (R. 3) The Bill of Exceptions was duly signed, settled and certified on April 23, 1938, within proper extension of time granted for that purpose. (R. 180-43-44) The assignments of error were filed on April 20, 1938. (R. 197)

The evidence introduced at the trial is summarized herein under the title "Summary of Evidence." At the close of the evidence the defendant made a motion for a directed verdict on the ground that ther was no substantial vidence sufficient to warrant a verdict of guilty as to any of the Counts of the indictment. This motion was over-ruled as to Counts 4, 7 and 8, and exception was taken thereto. (R. 153) Objections were interposed to some of the testimony offered by the United States, and received over objection, and exceptions were taken to the adverse rulings thereon. (R. 53, 56, 57) (R. 82, 138) (R. 68, 69, 70) (R. 72-73) (R. 89 to 95 inclusive).

The foregoing rulings present the questions raised on this appeal.

QUESTIONS PRESENTED

1. Whether there was any substantial evidence sufficient to warrant submission to the jury of Counts Numbered 4, 7 and 8 of the indictment.

2. Whether error was committed in admitting certain testimony in behalf of the United States.

SPECIFICATION OF ASSIGNED ERRORS

The assigned errors relied upon by the defendant are those numbered I (R. 181, 182); II (R. 183, 184; III (R. 185, '86); IV (R. '86, 187, 188); V (R. 189, 190); VI (R. 190 to 195 inclusive); all of which are set out in full hereinafter.

PERTINENT STATUTES

The defendant is charged in Count 4 of the indictment with violation of Sec. 338, Title 18, U. S. C. A., and the particular sub-division thereof which reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person within or without the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States . . . *or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, post card, package, writing, circular, pamphlet, or advertisement,* shall be fined not more than $1,000 or imprisonment not more than five years, or both.

The defendant is charged in Counts 7 and 8 of the indictment with violation of Sec. 88 of Title 18, U. S. C. A., which provides as follows:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisonment not more than two years, or both."

SUMMARY OF THE EVIDENCE

Preliminary Statement:

This summary of the evidence does not purport to be a summary of all the evidence. Five of the eight counts of the indictment were withdrawn from the jury at the close of the case, and it would not assist the court to detail the evidence relating strictly to these counts.

The evidence, for purposes of analysis, may be divided into four distinct classifications: (1) Evidence relating to the Wagner transaction consummated in 1925, and which embraces about one-third of the entire record. (2) Evidence of perpetration of the fraudulent scheme upon divers individuals by members of the separate conspiracies, as alleged in Counts 7 and 8. (3) Technical proof supplied by employees of the banks. (4) Evidence of certain statements made by the defendant and his relations with the two groups of conspirators; evidence of two checks received by the defendant from each of the two groups of conspirators,

totaling four in all, which said checks were shown to have been obtained pursuant to the execution of the fraudulent scheme.

(1) The evidence relating to the Wagner transaction is detailed with particularity, in an attempt to present a chronological and narrative statement thereof. This has necessitated skipping about from the testimony of one witness to another, to the end that the numerous links in this chain of evidence may be connected together to form an intelligible sequence. Without resort to such a method, any attempted summary of this line of proof would only add confusion to an already confused record.

(2) The testimony of the various witnesses who testified to the perpetration of the eye frauds upon them, has been practically eliminated from the summary of the testimony. It is not disputed that the actual conspirators did perpetrate the frauds upon the poor old people who testified in this behalf. It is not disputed, on the other hand, that the defendant had no connection whatsoever with the perpetration of these frauds. The only claim made by the Government is that the Defendant aided in furtherance of the fraudulent scheme by cashing, or attempting to cash certain checks obtained in execution of the fraudulent schemes. A summary of this line of proof would only add a rhythmic monotony to the review of the evidence without lending any assistance to the Court upon the questions presented.

(3) A substantial portion of the testimony relates to the technical proof supplied by employees of the various banks which handled the checks mentioned in the first six counts of the indicement, i. e., the Mershon check (Count 1), the Belter check (Counts 2, 3 and 4), and the Deibert checks (Counts 5 and 6). As already noted, the only portions of this testimony with which we are now concerned is that pertaining to the specific charge alleged in Count 4 of the indictment. The evidence in respect to this particular phase of the proof is summarized beginning at p. 23 of this brief.

(4) The evidence relating to certain statements made by the defendant, his relation with the two groups of conspirators and his method in cashing or attempting to cash the two checks obtained, respectively, in execution of each of the fraudulent schemes is set forth with particularity. It is upon this phase of the testimony that the essential contention in the case will be made by the government—on the subject of intent and on the question of whether the defendant was a party to the said fraudulent enterprises.

IMPORTANT EVIDENCE

Frank Nelson, alias Frank Faircloth, but commonly known as "Slats" Nelson, testified that he first met the defendant through a mutual acquaintance, Dr. Brown, shortly after the World War. Dr. Brown had an optical store adjoining the place of business of the defen-

dant at that time. The three visited together and were friendly (R. 50). This was in 1918 or 1919 (R. 61). After leaving the Army, Nelson entered the hotel business in Spokane and continued in that line of work for about four years, until "about 1925" (R. 61). While in Spokane, and apparently while operating the hotel, Nelson studied optometry for two years, and began practicing optometry in Spokane the latter part of 1924. He became a registered optometrist (R. 62). In 1925 Nelson discontinued the hotel business and the practice of optometry and began his criminal career in the "eye business," of which much will be seen as the theme progresses (R. 61). During the year 1925, and prior to November of that year, Nelson associated himself with the Dr. Brown previously mentioned, in the carrying on of the eye frauds (R. 57-138). On or about Nov. 18, 1925, Nelson and Brown acting together in their fraudulent scheme, performed a fraudulent operation upon the eye of a Mr. William Wagner, near Vancouver, Washington (R. 56-57-68-69-72-73). For the operation two checks were given, one for $500.00 and one for $175.00, both drawn on banks at Vancouver, Washington (R. 57). Dr. Brown cashed the $175.00 check at a Vancouver bank and received the money therefor (R. 57). Nelson attempted to cash the $500.00 check at a Vancouver bank, but the bank refused to cash the check due to a supposed irregularity of the endorsement. The bank did, however, certify the check to its full amount "good when properly endorsed" (R.

84). The check was endorsed in blank and was freely negotiable (R. 57-186). Nelson turned the check over to Dr. Brown and did not see the check again until 1936 (R. 57). A few days later the check came back to the bank, bearing a second endorsement, "O. A. Plummer," the alias name under which Nelson was operating at that time (R. 69-158). The record does not show who sent the check in for collection (R. 84). In the interim Mr. Wagner had informed Mr. Dubois of the bank of the circumstances under which the check was given, and when the check came through for collection, it was stamped "payment stopped" and returned to the forwarding bank (R. 84). Mr. Stapleton, now Circuit Judge of Multnomah County, Oregon, and at that time an attorney practicing in Portland, then took the check personally to the Vancouver bank and demanded payment. Mr. Dubois of the bank understood that Judge Stapleton was representing the defendant in making the demand (R. 84-85). It does not appear whether the banker informed Judge Stapleton of the circumstances attending the Wagner transaction (R. 85). However, "after these men departed with the checks," Mr. Wagner came to Portland in an effort to locate the "eye doctors" and talked with Mr. Mazurosky, his endorsement having appeared at some juncture upon the $500.00 certified check (R. 70-186). In that conversation, Mr. Wagner told the defendant of the circumstances under which the check was given (R. 83). Then a few days after Mr. Dubois of the bank had talked

with Judge Stapleton about the check, the Judge brought the same to Vancouver and personally and voluntarily surrendered the check to the bank without payment. The check was never paid (R. 84-85). Nelson testified that subsequently the defendant was reimbursed for having cashed the $500.00 certified check; that "there was a thousand dollars given to Mazurosky"; and that when he "casually" asked the defendant in 1931 if it really cost a thousand dollars to "square" that check, the defendant replied, "Well, you still owe me money." That was the only conversation Nelson ever had with the dfendant about the check (R. 52-53), and that was six years after the transaction occurred (R. 56), and the only time Nelson had seen the defendant between the time of the Wagner transaction in 1925, and the time he came back to this part of the country (Portland) in 1931 (R. 52-56).

After Nelson and Brown departed with the checks (Nov., 1925), Henry Wagner started on their trail (R. 70). He first came to Portland to interview the defendant, and did interview him one time alone (R. 70), and a second time in company with a police officer, the witness Goltz (R. 73-74). On each occasion, the defendant gave Mr. Wagner and the officer a full account of the transaction in which he obtained the check; stated that the parties had bought $106.00 worth of merchandise and that he had given them the balance of the $500.00 certified check in cash; that he had

known one of the men for a number of years; that he didn't know where they were, but thought they were around Portland; that Plummer (Nelson) was a gambler and that he "made" the logging camps (R. 74). The defendant gave accurate descriptions of both men to the police and to Mr. Wagner (R. 70-74-75-69).

To develop the defendant's knowledge of the Wagner transaction, the following questions and answers were propounded to and given by the Witness Nelson:

"Mr. Dillard: Q. did you ever discuss this plan or means that you have described here of obtaining these checks from the Belters and the Wagners with Joe Mazurosky, or discuss it in his presence?

"A. I don't really think we ever did discuss it.

"I do not remember of having any conversation with him in that regard.

"Mr. Dillard: Q. I will ask you if either you or this man Brown that you refer to ever discussed this system of obtaining money from people which you have described you used in the Wagner instance. Did you ever discuss it in the presence of the defendant?

"A. No, sir, I don't think that I ever discussed it witht Mazurosky or with Brown before any of us together." (R. 58).

The foregoing completes the record of the Wagner transaction.

It is apparent from the record that when Nelson and Dr. Brown combined their talents in the prosecution of the eye fraud in 1925, Brown closed his optometry store, discontinued practice, and devoted his full time to a career of fraud and criminal adventure with Nelson. Nelson testified that at the time of the Wagner transaction, he left "that part of the country" (R. 52) and did not return until 1931 (R. 56). Nothing further is heard of Dr. Brown except that he died and Nelson buried him at Cincinnati, Ohio (R. 65). The date of Brown's death does not appear in the record.

Nelson continued in the practice of the eye frauds from 1925 until 1928 or 1929, at which time he entered the hotel business at Seattle, Washington. He engaged himself in this line of work for about a year (R. 62). The record does not show whether during this interim period between 1925 and 1928, he practiced the eye frauds by himself or in combination with others (R. 62). After discontinuing the hotel business around 1929, Nelson re-entered the "eye business." He was convicted "on this racket" in 1930 at Rockford, Illinois (R. 62). He also served time in a penitentiary in Wyoming on a felony charge, the time and period of his incarceration not appearing in the record (R. 63). Aside from these three interludes, i. e., the operation of the hotel for a year around 1929, the Rockford, Illinois, incident, and that which occurred in Wyoming, he was engaged in perpetration of the eye frauds (R.

62). He would occasionally take time off to do some gambling (R. 62).

After returning to the Northwest in 1931, Nelson saw the defendant at various times. On a number of occasions, he borrowed money from defendant, who in connection with his store, operated a pawn shop (R. 62). These loans were never in excess of $50.00 at a time (R. 60-64). In 1931, Nelson, the defendant and other un-named parties took a pleasure trip some place in Washington and stayed three or four days (R. 60-61).

On or about September 20, 1935, Nelson performed one of his fraudulent operations upon the eye of one Belter (R. 136-54). For the operation, he received $300.00 in cash and Mr. Belter's check for $500.00. This check (Exhibit 4) was sent by Nelson through the mail from Spokane, Washington, to the defendant at Portland. It was endorsed in blank by one Londergan, Nelson's partner, and did not bear Nelson's endorsement (R. 50-51). Nelson used his true name of Frank Nelson in transmitting the check to the defendant (R. 50-51). At the time the check was forwarded, Nelson owed the defendant twenty or twenty-five dollars (R. 51-64). The defendant cashed the check and Nelson testified that the proceeds, $400.00, were sent to him by the defendant about six weeks after the date appearing on the check. Nelson gave him $50.00

for cashing the check, paid him $30.00 interest that he owed him, and the remaining $20.00 deduction was for money borrowed from the defendant (R. 51).

"Mr. Dillard: Q. I will ask you, Mr. Nelson, if you ever had a conversation with Joe Mazurosky, the defendant, relative to the cashing of checks that might be sent to him by you?

"A. Well, I really couldn't say that I did have any understanding.

"Q. Did you ever talk with Joe Mazurosky, the defendant, about a commission for cashing this check or other checks of a similar character?

". . . Objection. A. Well, there was only one time to my knowledge; the defendant told me that ten (10%) per cent wasn't enough; he would have to have more money than that.

"Mr. Dillard: About when was that?

"A. That was in '35.

"Q. At that time did he say any more than that, that ten (10%) per cent wasn't enough.

". . . He just said that the checks were getting a little hot and he would have to have more commission." (R. 52)

On or about the 6th day of December, 1935, Nelson and Londergan performed one of the fraudulent operations upon the eye of E. C. Deibert, at Rockford, Washington. The check of Mr. Deibert in the sum of $300.00 was given in payment for the operation and

the check was sent by Nelson to the defendant at Portland (R. 59). Nelson testified that he heard nothing further about the check. Nelson was asked why he sent the Belter check and the Deibert check (Exhibit 26) to the defendant, and he testified: "Well, I knew that the checks were to be handled through him" (R. 59). Nelson, in these communications, used his true name (R. 60).

"Mr. Dillard: I will ask you (Nelson) if you ever had a conversation with Joe Mazurosky, we will say between the years of 1929 and 1935, concerning the means by which you made your livelihood, made your living?

"A. About the only thing that was ever said in regard to the business was, he asked me, 'How are the suckers, Slats? Are you making any big sales?' *That was the only conversation we had* (R. 60).

"He asked me that several times between 1929 and 1935" (R. 60).

On or about the 20th of December, 1935, the defendant was interviewed by two police officers, the witnesses O. A. Powell and W. E. Williams, in reference to the Deibert check, Exhibit 26. The defendant identified the party, J. C. Adams as Nelson; told the officers he did not know his correct name, but that he was commonly known as "Slats" and that he had worked with Dr. Brown about 16 years ago in the eye specialist bunk as far as he knew. The witness Powell couldn't

recall whether the defendant told him he received the check personally or through the mail. The witness Williams testified that the defendant told him and Officer Powell that Nelson had brought the check in to have it cashed; that the defendant refused to cash it; he said he would put it through the bank and he (the defendant) didn't know whether it was any good until the officers told him it had come back (R. 80). Nelson, on the other hand, testified that he had sent the check to the defendant from Spokane, Washington (R. 59).

Testimony relating to the conspiracy charged in count VII of the indictment:

The witness John M. Gray testified that he was engaged in the eye frauds, and that he first entered the business in 1930. Prior to that time he had been a practicing optometrist for many years (R. 97). At the time of the trial, he was an inmate of the Texas penitentiary under sentence of 43 years for various crimes including assault and attempt to murder, grand theft, and an eye fraud charge in Norfolk, Virginia, to which he pleaded guilty (R. 96). The witness operated in the eye frauds between 1930 and 1935, and defrauded about 1,000 people during that period (R. 97-98). The witness first met the defendant in November, 1935; was casually introduced to him, and had no conversation with him (R. 86-93).

On or about October 29, 1934, Gray, in conjunction with one T. A. Andrews, imposed the fraudulent eye

treatment on one Mrs. Mershon in the vicinity of Arlington, Washington (R. 86). For this service, they received the check of Mrs. Mershon in the sum of $450.00 (R. 134). Gray took the check to Seattle, Washington, and delivered it to one Roy Martin, another confederate in this particular scheme (R. 86). The witness didn't know personally what Martin did with the check, but Martin told him that he mailed the check to the defendant (R. 90). Martin also told Gray that it would cost him (Gray) 15% to get the check cashed through the defendant. Subsequently, by pre-arrangement with Roy Martin, Gray went in company with Mrs. Roy Martin to the store of the defendant in Portland, Oregon, and received the proceeds from the Mershon check. Gray testified that the 15% was deducted for cashing the check (R. 86-87). The witness was not sure it was the defendant who delivered the money, but from his location outside the store of the defendant, the party looked to be about Mr. Mazurosky's height. He would not swear it was the defendant whom he saw in the store (R. 88).

The witness Horack, Portland City Police, testified that "around December 18, 1934" he had interviewed the defendant at his store in Portland and talked with him about the Mershon check, Exhibit 1. Mr. Mazurosky identified his signature and stated that he had cashed the check. The officer told the defendant that the check had been obtained in a "bunco game," and

the defendant told the officer he did not know how the check was obtained; that he did not know the whereabouts of the party ho gave him the check; that the party was a doctor. The witness stated that the details of the matter were hazy in his recollection; that on the previous trial he "might" have testified that he didn't ask the defendant anything about who the parties were from whom he (the defendant) obtained the check (R. 104-105).

The witness Eichenberger, Portland City Police, testified that he interviewed the defendant in December, 1934, in company with officer Horack, concerning the check, Exhibit 1; that the defendant told them that he had cashed the check at the Bank of California; that the check had been given him for the purchase of some goods; that he had cashed the check and delivered the balance of the money to the party (R. 106).

On or about September 13, 1934, Gray and his associate, Andrews, perpetrated the eye fraud on one Allen in the vicinity of Boulder, Colorado (R. 93). In payment for the operation, a cashier's check drawn upon the Mercantile Bank and Trust Co. of Boulder, Colorado, in the sum of $500.00 was given Gray.

After receiving the check, Gray gave the check to Martin, who told him he could get the check cashed by sending it to the defendant at Portland and that it would cost 15% to have the check cashed. Martin told

Gray he was going to send the check to the defendant and did mail it to the defendant from Denver, Colorado. Later, Martin gave Gray $425.00, the proceeds from the check (R. 94-95).

Gray testified that Martin and another associate, Crangle, are at this time in the penitentiary at Atlanta, Georgia; that T. A. Andrews is an inmate of a Federal penitentiary in Virginia (R. 92).

ARGUMENT

I

ASSIGNMENT OF ERROR No. I

"The Court erred in over-ruling defendant's motion for a directed verdict as to Counts 4, 7 and 8 of the indictment made at the conclusion of the case after all parties had rested, for the reasons therein set forth:

Mr. Biggs: "The Government having rested and the defendant at this time resting, moves the Court for its order directing a verdict of not guilty as to each of the counts in the indictment, on the ground and for the reason that there is no substantial evidence sufficient to submit to the jury which establishes or tends to establish the connection of the defendant with any scheme or artifice to defraud, or the particular scheme or artifice to defraud described and set forth in each

count of the indictment, or the use of the mails pursuant to said scheme, there being no conscious participation of the defendant in such scheme. With respect to the count of the indictment relating to the defendant's alleged connection with Roy Martin, John Gray, and others, for the further reason that there is no testimony whatsoever connecting the defendant with any criminal device, scheme, intent, or plan on their part, all of the testimony admitted being the testimony of acts or declarations of alleged co-conspirators, and there is an inadeuate prima facie showing of a conspiracy.

"The Court: Which count is that, now?

"Mr. Biggs: That is Count 1 of the indictment,Your Honor, and also Count 7 of the indictment, being the conspiracy count, and for the further ground that there is no substantial evidence that the United States mails were used by the defendant voluntarily or involuntarily or at all in connection with this."

Thereupon the following proceedings were had:

"The Court: The Court at this time denies the motion for a directed verdict as to Counts 1, 2, 3, 5 and 6.

"Mr. Biggs: And may we have an exception to the Court's ruling as to Counts 4,7 and 8 of the indictment?

"The Court: Yes" (R. 181-182).

This assignment raises the question whether there was any substantial evidence sufficient to warrant sub-

mission to the jury of Counts numbered 4, 7 and 8. Three distinct and severable lines of testimony were offered by the government in support of each count, respectively, and the argument will be directed to each count in chronological sequence.

COUNT IV

INTENT AND KNOWLEDGE

Proof of intent and knowledge on the part of defendant, as respects this count is closely identified with the same question applying to Count 8. Discussion of this element of the testimony will therefore be deferred for treatment in the argument under the same sub-head under said Count 8, beginning at p. 55 of this brief.

PERTINENT FACTS AND DISCUSSION

Attention is directed to the proof proffered by the United States in support of Count 4 of the indictment. The Court held that there was no sufficient evidence of mailing of the Belter check (Exhibit 4) by the Bank of California (R. 160), but the record does show that the defendant deposited the check with the Bank of California, at Portland, Oregon, for collection and that it was transmitted to the First National Bank of Kennewick, Kennewick, Washington. Upon receiving the item for collection, the Kennewick Bank debited the account of the drawer of the check, Mr. Belter, and thereupon forwarded to the Bank of California at

Portland its own draft drawn upon the First National Bank of Portland, to the favor of the Bank of California, in payment of the check. Adequate proof was offered to show that the draft was transmitted by the use of the United States mails (R. 117). No evidence whatsoever was offered to show the custom of the banks in the payment by the collecting bank of items sent by the forwarding bank for collection. There is not so much as a suggestion in the record that it was the custom and/or ordinary course of business for the collecting bank to remit and pay by means of its own draft.

The subdivision of the statute, Sec. 338 of Title 18, U. S. C. A., under which this count of the indictment was drawn provides: "Whoever shall *knowingly* cause to be delivered by mail . . . any such letter, etc., for the purpose of executing such scheme, shall be fined, etc. It is assumed from the line of proof received in an attempt to establish liability on this count of the indictment that the Government relied upon the rule enunciated in the cases of *Spear vs. U. S.,* (CCA 8th, 1917) 240 F. 250, cert. denied (1918), 246 U. S. 667, 38 Sup. Ct. 335, 62 L. Ed. 929; *Savage vs. U. S.,* (CCA 8th, 1920) 270 Fed. 14, cert. denied (1921) 257 U. S. 642, 42 Sup. Ct. 52, 66 L. Ed. 412. The rule of these cases is that liability may attach even when the actual mailing has been done by a person entirely independent of the defendant's control, this presumably upon a fictitious agency theory. A second theory found in the

cases as a basis for liability under the statute, is found in the rule that if the transmission of the item through the mails was the natural and reasonable consequence to be anticipated by the parties, this shall satisfy the provision requiring that the party shall "knowingly" cause the item to be mailed. *Shea vs. U. S.,* 251 Fed. 440; cert. denied 248 U. S. 581, 39 Sup. Ct., 132, 63 L. Ed. 431.

It is of course true that when a party deposits a check with a bank for collection upon an out-of-town bank, he may reasonably anticipate that the check will be forwarded through the mails in the process of making the collection. Any one at all cognizant with banking practice knows that the original check must find its way to the drawee bank. The bank becomes the depositor's agent in so forwarding the check. *Spear vs. U. S.,* supra. But the foregoing rule is without application to the facts offered in support of Count 4 of the indictment. The proof shows that the First National Bank of Kennewick, the bank on which the check was drawn, cashed the check, that is, debited the account of the drawer and charged itself with the amount of the collection (R. 118). It thereafter forwarded its own draft drawn to the favor of the Bank of California, in payment of the collection item (R. 117).

We proceed now to an analysis of the facts and the rules of law pertinent thereto to determine whether

the evidence in the case establishes liability under either one of the theories of liability suggested in the cases which have construed the statute, and to which reference is made, supra.

The First National Bank of Kennewick was not acting as the agent of the defendant or of the Bank of California in transmitting its draft to the Bank of California, in payment of the check after collection thereof:

The relation between the forwarding bank (Bank of California) and the collecting bank (First National Bank of Kennewick) was that of principal and agent until the agent had completed the business of collection. Upon debiting the account of the drawer of the check, the First National Bank of Kennewick became the debtor of the Bank of California, and the agency relation ceased. One duty (the duty to collect) came to an end, and another (the duty to remit) arose in its place. Mr. Justice Cardoza in *Jennings et al. vs. United States Fidelity & Guaranty Co.,* 294 U. S. 216, 55 Sup. Ct. Rep. 394, 79 L. Ed. 869 (1935). In the foregoing case the learned justice cites numerous cases which serve to dissipate any possible theory of agency pertaining after the collection has been effected and the money received by the bank which has made the collection, i. e., the drawee or collecting bank. The collected funds were "mingled" with the funds of the collecting bank and the agency relation theretofore existing, gave way to the normal debtor and creditor relation. The

legal and factual status of the defendant is thus clearly distinguishable from that exhibited in the line of cases above adverted to, which are usually cited as the leading cases on this particular phase of the problem.

It should be observed that under the cases where liability has been imposed for sending or causing a check to be sent through the mails by a bank, the facts have invariably disclosed that the check was forwarded *for collection,* thereby uniting the defendant in the case as principal with the forwarding bank as agent. Where the check is not placed with the bank for collection, but, rather, is cashed by the bank and credit given, the relation of principal and agent would not come into being. The bank would thereby receive title to the check and its act in forwarding the same through the mails to the drawee bank would not in any sense be deemed one directed to the execution of a fraudulent scheme. *Douglas vs. Fed. Res. Bank,* 271 U. S. 489, 492, 46 Sup. Ct. 554, 556, 70 L. Ed. 1051. *Newland vs. First National Bank of Kansis City,* (CCA 8) 64 Fed. (2) 399, 402. The relation between the depositor of the check and the bank would simply be that of debtor and creditor and the act of forwarding of the check would be an independent banking transaction. Correlatively, when the agency is cut off by the collecting bank's receipt of the funds in payment of the check, its act in making payment to the forwarding bank by means of its own draft is an independent banking trasaction between the col-

lecting bank as debtor and the forwarding bank as creditor. *Jennings et al vs. United States Fidelity & Guaranty Co.*, supra.

In concluding, attention is directed to the case of *Spillers vs. U. S.*, 47 Fed. (2) 893 (CCA 5). The testimony showed that the defendant had sent five checks to a Mrs. Oliver at Weatherford, Texas. Her daughter received them and deposited them in the bank, which bank in turn sent them to another bank in another city. A witness testified that in the usual course of business the checks would be sent by mail. Additional facts are found in the decision of the court:

> "It was not shown that the bank was the agent of the appellant or had any dealings with him . . .
>
> "No doubt the statute is to be broadly interpreted to effect the intent of Congress. The general rule may be deduced from the reported cases that whenever a person puts in motion a train of circumstances that *will inevitably cause the mailing of a letter as a necessary step in a fraudulent scheme,* he may be found guilty of causing the letter to be mailed on sufficient proof of knowledge and intent. . . . *However, it is not every incidental use of the mail that occurs as a result of the scheme that would constitute a violation of the law. The letter must be knowingly mailed or be caused to be mailed in furtherance of the scheme by the defendant.*"
>
> "*On the undisputed facts in the record there is nothing to show that appellant knew, or had any reason to know, or intended that any of the parties to whom checks were sent would deposit them in*

banks which would in turn mail them to Fort Worth or Dallas for collection or that he in any way induced the deposits."

The foregoing case is cited at this stage of the argument on the proposition that the courts require the establishment of the relation of agency where a defendant is sought to be charged for having caused banks to handle checks received as the fruits of a fraudulent scheme. The case is to be considered in conjunction with the decisions already cited which impose liability where the bank is made the agent by receiving a check for collection. We proceed now to point out that there is nothing in the record to show that appellant knew, or had any reason to know, or intended that the Bank of Kennewick should send its draft through the mails, thereby to render him liable on this count of the indictment.....

The transmission through the mail of the draft, Exhibit 11, was not the natural and reasonable consequence to be anticipated by the defendant in the collection of the check, Exhibit 4, and the Defendant did not therefore "knowingly" or at all cause the mails to be used.

We are confronted at the outset with the proposition, already mentioned, that there is a total absence of any evidence showing that it was the custom, practice and ordinary course of business for the First National Bank of Kennewick or for any other bank to remit collected items by its own draft. Moreover, there is no evidence or suggestion in the record of knowledge

possessed by the defendant as to the customs and practices of banks in the handling of such items beyond the fact the defendant did keep a bank account and did avail himself of the ordinary banking facilities.

Counsel for the government and the court apparently assumed that the same course of practice was indulged by banks in the remitting of funds collected on a forwarded item, as in the case of an original check forwarded for collection. This is far from the fact and the rule has long been settled, both in the state and the Federal courts, that the two phases of the transaction, i. e., the forwarding for collection and the remitting of the funds collected rest upon different considerations of fact and law.

A precise statement of the rule to which reference is made is found in the case of *Federal Reserve Bank of Richmond vs. Malloy et al.,* 264 U. S. 160, 44 Sup. Ct. Rep. 296, 68 L. Ed. 617. Under the facts of that case, a check was sent for collection to the bank upon which the check was drawn. The collecting bank charged the account of the drawer of the check and stamped the check "paid" and on the same day of receipt of the item, transmitted its draft drawn upon another bank in payment of the collection. The question was whether the collecting bank had the right as a matter of law and under prevailing custom and practice to remit by forwording its own draft rather than the actual money called for by the terms of the check. The collecting

bank's draft was not honored, and the question of the right of the collecting bank to remit by its own draft was squarely presented. Further facts are noted in the extracts from the opinion of Mr. Justice Sutherland. The Court held:

"It is settled law that a collecting agent is without authority to accept for the debt of his principal anything but 'that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par.' *Ward vs. Smith,* 7 Wall. 447, 452 (19 L. Ed. 207). The rule applies to a bank receiving commercial paper for collection.

"(Citing cases.) It is unnecessary to cite other decisions, since they are all practically uniform. *Anderson vs. Gill,* supra, presented a situation practically the same as the one we are here dealing with, and the Supreme Court of Maryland, in disposing of it, said:

" 'Now, a check on a bank or banker is payable in money, and in nothing else. Morse, Banks & Banking (2nd Ed.) p. 268. The drawer, having funds to his credit with the drawee, has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should upon presentation, instead of requiring the cash to be paid, accept at the drawer's risk, a check of the drawee upon some other bank or banker.' . . .

"Finally, it is urged that the acceptance of the drawee's own draft, instead of money, was justified by custom. The testimony relied upon to establish the custom follows:

" 'The business of check collecting is handled by the Federal Reserve Bank in a way very similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank on which they are drawn or to some other bank in that city, and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers, and to remit by means of its exchange draft or by a shipment of currency.'

"It thus appears that the custom, if otherwise established, does not fix a definite and uniform method of remittance. When checks are sent for collection and return, the bank is expected to cancel the checks, and charge them to the account of the drawers, and remit 'by means of its exchange draft or by a shipment of currency,' the former being used more frequently than the latter. Whether the choice of methods is at the election of the drawee bank or the collecting bank does not appear. If it be the latter, it would seem to result that the election to have remittance by draft instead of currency, being wholly a matter of its discretion, or even of its caprice, as to which the owners are not consulted, would be at its peril, rather than at the risk of the owners of the check.

"*But the proof shows that the alleged custom was not known to plaintiffs, and they could not be held to it without such knowledge,* because, all other reasons aside, by its uncertainty and lack of uniformity, it furnishes no definite standard by which the terms of the implied consent sought to be

established thereby can be determined. It furnishes no rule by which it can be ascertained when an exchange draft shall be remitted and when currency shall be required, or who is to exercise the right of election. . . .

"*A custom to do a thing in either one or the other of two modes, as the person relying upon it may choose, can furnish no basis for an implication that the person sought to be bound by it had in mind one mode rather than the other.*

"It is said, however, that there is a custom among banks to settle among themselves by means of drafts, so well established and notorious that judicial notice of it may be taken. But the usage here invoked is not that, but is one of special application to a case where the collection of a check is intrusted to the very bank upon which the check is drawn and where payment is accepted in a medium which the contract, read in the light of the law, forbids. The special situation with which we are dealing is controlled by a definite rule of law which it is sought to upset by a custom to the contrary effect . . ." (Italics ours.)

The law of the State of Washington is to the same effect. In *First National Bank vs. Comm. Bank & Trust Co.,* 242 Pac. 356, 358, 137 Wash. 355, it was held that in the absence of custom or agreement, a collecting bank is without authority to accept for the debt of its principal anything but that which the law declares to be legal tender.

The Supreme Court of Oregon held to the same effect in *Loland vs. Nelson,* 139 Ore. 581, 585, 8 Pac. (2) 82:

> "The acceptance by the Federal Reserve Bank, Portland Branch, of a draft upon the Bank of California, instead of demanding and collecting the money due on said check, *was in no sense the act of defendants Jenning, nor should they be chargeable therewith.*"

An interesting case on the same point is *Farmers Bank and Trust Co. vs. Newland,* 31 S. W. 38,39, 97 Ky. 464, wherein the Court held:

> "Since the paying bank's draft may not under the rule be accepted by a collecting bank, the only course remaining is to send an agent to the point of collection or to have the bank or agent at that point *send the actual money by express or other means of transportation.*"

Though there is no evidence in the record that it is customary to forward money or currency by express, and not through the mails, the Court is asked to take judicial notice of that fact. The phrase "shipment of currency" referred to in the Malloy case, supra, quite obviously did not refer to a transfer of the money by use of the mails. For other cases see *Marshall vs. Wells,* 73 Am. Dec. 381; *Rainwater vs. Federal Reserve Bank of St. Louis,* 290 S. W. 69, 172 Ark. 631.

With the foregoing rules of decision in mind, it may not be successfully contended that the forwarding of the draft by the First National Bank of Kennewick

to the Bank of California, at Portland, was a reasonable consequence to be anticipated by the Defendant, upon his deposit of Exhibit 4 with the Bank of California for collection. *There is not a scintilla of evidence in the record showing what the custom of the respective banks was in the remitting of funds collected on checks forwarded to the drawee bank.* No special contract or even the basis for an implied understanding between the banks defining the terms of the remittance is shown. In the absence of a special agreement, or of custom of universal application shown to have been known to the defendant, he would naturally assume as this Court would that the Kennewick bank would act within the bounds of its legal authority and remit in the specific medium called for by the terms of the check, to-wit: *Five Hundred Dollars,* and not by means of its own draft. *Fed. Reserve Bank vs. Malloy,* supra.

If counsel for the Government should have sought to offer proof on the subject of the customs and practices of banks in remitting funds collected on checks forwarded for collection by draft, grave difficulty would be encountered in supplying the necessary proof. The Federal Reserve System has as one of its essential functions, a means of clearing checks without an interchange of communication by mail between corresponding banks. The teletype, the radio, and the telegraph companies all play stellar roles in the banking drama as it is enacted daily in the banks of this country, both large and small. The First National Bank of Kenne-

wick is not a "distant" bank within the perview of the decisions. It is within the immediate trading area of Portland, Oregon, in the Columbia Basin, and maintains its correspondent bank in Portland (R. 116).

In considering this phase of the question, the language of Judge Chase, found in the case of *United States vs. Baker et al.,* 50 Fed. (2) 122, (CCA 2), is peculiarly appropriate:

> "Since proof of the mailing of one of these letters was the sine qua non of the crime charged, it is necessary to look closely to this question upon which so much depends to determine whether it supplied the requisite proof. Of course, the necessary proof may be furnished by circumstantial evidence alone. *Freeman et al. vs. United States,* supra, and cases cited. But the circumstances proved must exclude all reasonable doubt.

The presumption, under the facts appearing in the record, is that the defendant intended the remittance of the funds collected on the Belter check, Exhibit 4, to be made without use of the United States Mails.

The remittance of the funds collected upon the check, Exhibit 4, might have been made in the reasonable anticipation of the defendant, in a number of ways without resort to use of the mails. The record is devoid of any evidence showing the customs and practices of the banks in the mode or formulae customarily adopted by them in making such remittances. There is an absence of any evidence showing knowledge on the part

of the defendant of any such customs and/or practices, if they do exist. Where it is shown that an act may be performed in one of two ways, one of which involves violation of a penal statute, and the other does not come within the interdiction of the statute, the presumption is that the defendant intended the act to be performed in an alternative manner which would not involve violation of the statute. Underhill on Criminal Evidence, Ed. 1935, p. 52, contains expression of the rule in the following language:

> "Where there are two conclusions reasonably possible, one compatible with innocence, and the other with guilt, the presumption of innocence must prevail."

The rule is aptly phrased in the case of *Willsman vs. United States,* 286 Fed. 852, 856 (CCC 8):

> "Evidence of the facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." See cases cited in the decision, and see also *Terry vs. United States,* 7 Fed. (2) 28, 31 (CCC 9).

In *Dalton vs. U. S.,* 154 Fed. 461 (CCA 7), the accused was a party to a fraudulent scheme in which he and his confederates used the express and the telegraph

companies in its execution. Subsequently certain of the conspirators began use of the U. S. Mails, but it was not shown that the accused participated in the scheme after the use of the mails was adopted as an aid in furthering the scheme. Counsel for the Government sought to invoke "an inference or presumption of continuance arising from the facts and circumstances proven," but the court rejected the argument, and held:

> "Under the established rule of our criminal law, however, as well defined in *Coffin vs. United States,* 156 U. S. 432, 458, 15 Sup. Ct. 394, 39 L. Ed. 481, the 'presumption of innocence is an instrument of proof created by the law in favor of the accused,' *and the presumption that the accused would not remain in the concern when it turned into a criminal course (criminal under the Federal Statute) would set aside or overcome the assumed inference of fact relied upon.*"

The court in the above case also observed (pp. 462, 463):

> "Moreover, while several witnesses state conversations with the plaintiff in error to arrange for transmissions of the (so-called) literature by express in 1903 and 1904, the record is without proof . . . of facts to charge the plaintiff in error with purpose at such times to use the mails in execution of the scheme."

The case of *Coffin vs. U. S.,* cited in the Dalton case, supra, appears to be the leading case defining the full limits of the application by Federal Courts of the presumption of innocence. The Court goes further than

to consider this rule as a presumption under the usual definition of the term, but defines it rather as an "instrument of evidence," operable at all times in a criminal case in favor of the accused.

It is respectfully submitted that there is an absence of any testimony in the record sufficient to warrant consideration by the jury of Count 4 of the indictment.

COUNTS VII AND VIII

Both of the foregoing counts are predicated upon an identical theory and most of the legal propositions applicable to one will apply with like effect to the other. Since each count embraces a distinct and separate conspiracy, complete in itself under the theory of the prosecution, the facts offered to support one conspiracy count will be without relevancy to sustain the other. The testimony received in respect to Count 7 is summarized bginning at page 18 of this brief. The remainder of the testimony as summarized herein, was directed to the proof Count VIII.

Among other things, the prosecution carried the burden of proving (a) that a conspiracy existed as charged in each count of the indictment; (b) that the defendant was one of the conspirators, and (c) that it was a part of the agreement comprising the conspiracy that the U. S. Mails should be used in executing it.

INTENT TO USE THE MAILS

There is no substantial evidence to show that it was a part of the agreement comprising the conspiracy that the United States Mails should be used in executing it.

This point applies to both conspiracy counts. The methods of approach of each group of conspirators were similar in character. Without exception, and so far as the record shows, in each of the thousands of frauds perpetrated, the conspirators would personally call upon the victim, would personally persuade the victim, perform the fraudulent operation, and thereupon personally receive the check or the cash in payment therefor. The witness Gray testified that between 1930 and 1935, he and his confederates imposed the fraudulent scheme upon about one thousand people. (R. 97-98) If Nelson was as active in his conspiracy, as Gray was in his, Nelson and his group imposed the fraud upon approximately two thousand people during the entire period of his engagement in it. From the record, it appears that only on two occasions did Nelson use the mails in alleged furtherance of the scheme and that was only after an attempt had been made in each instance to personally cash each of the checks at the banks or in the neighborhood where the respective checks were received. Such was the invariable practice. An identical course was pursued by Gray, and out of the approximate number of 1000 frauds perpetrated by his group, there were but two occasions in which the mails were used as shown by the record.

It is significant that though Gray, heading one of the conspiracies and Nelson, heading the other, both testified apparently without reservation and freely discussed all the details relating to the respective conspiracies, and neither of them testified that it was a part of the scheme that the mails should be used. This is a circumstance heretofore recognized by this court to be of controlling importance. *Kuhn vs. United States,* 26 F. (2d) 463 (CCA 9).

With the foregoing facts in mind, attention is directed to the case of *Farmer vs. United States,* 223 Fed. 903 (CCA 2), cert. denied 238 U. S. 638, 59 L. Ed. 1500, 35 S. C. 940. The facts upon which the ruling was based may be substantially inferred from the language of the court, as follows:

> "Count 1 charged a conspiracy (section 37) to commit a violation of that section (215). Under the first count, therefore, the government had to sustain a heavier burden of proof as to the intent of the conspirators than under the other two. Under 215 it is sufficient to show an intent on the part of the deviser or devisers of the scheme to defraud some one; it is no longer necessary to show an intent to use the mails to effect the scheme, as it was under section 5480, U. S. Rev. Stat. The deviser of the scheme may, at the time he planned it, have intended to avoid all use of the mails in carrying it out; nevertheless if, in carrying it out, he does use the mails, the offense is committed. There are two elements of the crime, a scheme intended to defraud and an actual use of the mails; both, of course, must be proved to warrant conviction. When, however, the charge is conspiracy to commit

the offense specified in section 215, it is necessary to prove an intent, not only to defraud, *but also to defraud by the use of the mails.* The draftsman of the indictment fully appreciated this; the first count charges an intent to use the mails as well as an intent to defraud.

"Upon a careful examination of the record we are satisfied that the government failed to prove an intent by the conspirators named in the first count to use the mails to effect the scheme. Direct evidence of intent is rarely available; it may be shown by circumstances. Usually when the scheme is unfolded it is apparent that it could not be carried out without using the mails, and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails. We do not find in this record sufficient to warrant the inference that on January 2, 1910, when the conspiracy was formed, the conspirators intended to use the mails. The scheme revealed is markedly different from others which have been before the courts (mainly under old section 5480), where it was evident that the scheme could not be successfully carried out without using the mails. Thus in the old 'green goods game,' *no personal interview could be risked* until, after an exchange of letters, it appeared that some individual was a person who might be safely trapped. When the scheme is to dispose of stock at inflated prices, advertisements have to be published *calculated to bring inquiries by mail from many different places;* in that only can a sufficiently broad field be found for the dissemination of the securities. *But in this scheme different tactics are required.* Advertising in the hope of bringing response from persons eager to pay $10,000 or $25,000 or $50,000 for a few books would be a waste of money. The only practical method is to find out *by inquiry* the names of persons likely to be fooled,

and then *to have them interviewed by one or more glib talkers and thus persuade them to buy through ingenious representations* and the exhibition of letters, telegrams, newspaper clippings, samples, etc. When books in sets are bought, presumably they are sent by express, and *the person who effected the sale personally takes the check that pays for them.* Since inference is not enough to make out full intent under Count 1, and there is no direct evidence of it, *we think conviction under this count should be reversed.*"

In *Schwartzberg vs. United States,* 241 Fed. 348 (C. C. A. 2), the general nature of the charge contained in the count for conspiracy and the numerous counts for the substantive offense was that one Bamberger (a defendant) during several years represented himself to the persons and corporations to be defrauded as a skillful salesman or a person able to procure business, and having by such representations obtained some business connection with said persons, he recommended as good customers the other defendants. Thereupon Bamberger's victims sold on credit to the other defendants; both they and Bamberger making, when it was thought advantageous, false representations as to their financial position and honest intent. For the goods sold, payment was substantially never made. The court, in holding that the evidence did not warrant conviction on the conspiracy count, at page 353, said:

It is substantially admitted that an inspection of the record does not justify the finding necessary to sustain the conspiracy count, viz., that there was

an intent on the part of the conspirators to use the mails in the execution of the scheme. *Farmer vs. U. S.*, 223 Fed. 903, 139 C. C. A. 341. *While the mail was used quite extensively, and in execution of the fraud, the reliance of defendants, when some certainly conspired to defraud, was upon Bamberger's quick tongue and fertility in falsehood.* The intent which we held necessary in the Farmer case was naturally not proven by direct evidence, and could not be inferred beyond a reasonable doubt.

"The judgment on the conspiracy count is reversed."

A comparison of the facts of the Farmer case, supra, with those offered by the Government in support of each of the conspiracy counts, will reveal a striking similarity, if not indeed, a substantial identity. The Farmer case presents the settled law on this particular phase of the question. It has been cited and approved by this court. *Stubbs vs. United States*, (C. C. A. 9) 249 Fed. 571.

Judge Morrow, speaking for this circuit in *McKelvey vs. United States*, 241 Fed. 801, in sustaining the sufficiency of an indictment emphasized that "the use of the mails and post office establishment formed a part of, and was the essential fact of, the conspiracy to commit an offense against the United States." See also *Morris vs. United States*, 7 Fed. (2d) 785, (C. C. A. 8) to the same effect.

Section 5480 of the Rev. St., which was in effect prior to the adoption of the Penal Code, prohibited the

mailing of a letter in the execution or attempted execution of a scheme to defraud. This section required that there must not only be a scheme to defraud, but that the scheme must contemplate the use of the United States post office establishment. The present statute, does not require that it be shown that there was an intent to use the post office establishment. It is sufficient if the said establishment is used. However, in order to prove conspiracy to use the mails to defraud it is necessary, as shown above, to establish that it was an essential part of said conspiracy to use the mails to defraud. Hence the decisions construing the effect of the provisions of said section 5480 are applicable to charges of conspiracy at the present time.

In *Brooks vs. United States,* 146 Fed. 223 (C. C. A. 8), Syll. 1, it was held:

> "In order to make out the offense defined by Rev. St., Sec. 5480 (U. S. Comp. St. 1901, p. 3696), prohibiting the mailing of a letter in the execution or attempted execution of a scheme to defraud, there must not only be a scheme intended to defraud, but such scheme must contemplate *as one of its essential parts the use of the United States post office establishment* to effect its purpose, the gist of the offense being the mailing of the letter in furtherance of *such a scheme.*"

Again in *United States vs. McCrary,* 175 Fed. 802, Syll. 1, it was held:

> "To constitute the offense of 'using the mails to effectuate a scheme to defraud,' within Rev. St., Sec. 5480 (U. S. Comp. St. 1901, p. 3696), the scheme must have been one which contemplated the use of the post office establishment to effectuate it, and *it is not sufficient that the mails were used as a mere incident to some fraudulent scheme.*"

It is submitted upon the basis of the authorities cited, that there is no substantial evidence to show that it was a part of the plan and scheme of the conspiracies set forth in Counts numbered 7 and 8 of the indictment that the United States mails should be used in the execution thereof.

PROOF OF DEFENDANTS PARTICIPATION AS A MEMBER OF THE CONSPIRACIES CHARGED

Pertinent Facts Relating to Count VII:

The facts relating to this count are summarized beginning at page 18 of this brief.

It may be admitted at the outset that a conspiracy existed between Gray, Martin et al., for the purposes set forth in the indictment; also that an overt act was committed sufficient to support the charge. The failure

of proof is found in the absence of any substantial evidence to show that the defendant was one of the conspirators.

The only one of the parties to this conspiracy who testified was the witness, Gray. He did not testify that the defendant was a party nor did he give any testimony from which it might reasonably have been inferred that the defendant was so associated. The witness Gray did not meet the defendant until a week or ten days after consummation of the last transaction mentioned in the indictment. It was shown that Martin and the defendant knew each other and that Martin knew the defendant would cash checks sent to him upon a discount basis of fifteen per cent; that Martin sent the defendant two checks (Mershon and Allen) obtained pursuant to the fraudulent scheme, and that the defendant cashed these checks and retained 15 per cent of the amount of each check for this service. In cashing the checks the defendant endorsed them in his true name and deposited them with his own bank. One of these checks was a cashier's check (R. 135). The circumstances attending the cashing of the checks by the defendant were regular. No inference adverse to the defendant may b drawn from the fact that he discounted the checks in cashing them. The court will take judicial notice of customary business practices. The profit obtained upon discount of commercial paper is a legitimate profit and these transactions as shown by the

record were simply that. The defendant was in the business of operating a loan-office and pawn shop. It was to be expected that in the absence of knowledge of the fraud, he would cash the checks and take a profit for doing so.

The officer Horack testified that "around December 18, 1934," he interviewed the defendant concerning the Mershon check, Exhibit 1, and told the defendant at that time that the check was received in a "bunco game," and the defendant told the officer he did not know how the check was obtained. After receiving the information from the officer that the Mershon check was received in a "bunco game," it does not appear that the defendant handled any more checks for the Martin-Gray gang of conspirators.

There is an absence of any testimony to show that either Gray or Martin told the defendant about the fraudulent scheme. There is nothing to show that Martin was not engaged at the same time in legitimate enterprises. There is not a syllable of testimony showing or even indicating that the defendant knew or had any basis for knowing that the particular checks (Mershon and Allen) were obtained pursuant to execution of the fraudulent scheme.

Counsel for the government will doubtless concede that the evidence offered by the United States was purely circumstantial. No witness testified that the

defendant was one of the group. Defendant's only connection with either of the transactions set forth in this count of the indictment was through Roy Martin who told the witness Gray that the defendant would cash the checks upon a discount basis of fifteen per cent.

In evaluating the evidential credence to be given circumstantial evidence, resort must be had to certain elemental rules of law to which reference will now be made.

The evidence received in support of Count VII of the indictment is consistent with the innocence of the accused, and upon a record showing such to be the fact, the conviction will be set aside.

The rule is established without exception in the Federal courts that facts which merely give rise to a reasonable and just inference of the guilt of the accused, are insufficient to warrant a conviction. To warrant a verdict of guilty, the evidence must be of such character as to exclude every reasonable hypotheses but that of guilt of the offense imputed to the defendant. The facts must be consistent with his guilt only, and inconsistent with his innocence. *Terry vs. U. S.,* (C. C. A. 9) 7 Fed. (2) 28, 31. *Whenever a circumstance, relied upon as evidence of criminal guilt* is susceptible of two inferences, one of which is in favor of innocence, *such circumstanc is robbed of all probative value, even though, from the other inference, guilt may be fairly deductible. Turinetti vs. U. S.,* 2 Fed. (2) 15 (C. C. A. 8): *Vernon vs. U. S.,* 146 Fed. 121, 123 (8th).

Without proof that the defendant knew that the checks were obtained pursuant to the fraudulent scheme alleged in Count 7, and without proof that the defendant knew that it was an essential part of the structure of said conspiracy that the mails should be used, it is difficult to determine a theory upon which the government can hope to suggest an hypothesis of guilt, to say nothing of any number of hypotheses of innocence apparent upon the face of the record. The presumption is that the defendant did not know of the fraudulent scheme, and that everything he did was in good faith. *Coffin vs. U. S.,* 156 U. S. 432, 458, 460, 15 Sup. Ct. 394, 39 L. Ed. 481.

If it should be stated that the practice of discounting checks, in itself contains basis for an inference of guilt, the question is immediately presented, guilt of what? The defendant was not indicted for any irregularity in the cashing of checks. He is charged simply as a conspirator, and as a party to a fraudulent scheme. Proof that the defendant was guilty of irregular conduct or of acts directed to some unlawful end is not sufficient. The proof must establish that the acts of the defendant were directed to the accomplishment of the particular fraud alleged in Count 7 of the indictment. *Lonabaugh vs. U. S.,* 179 Fed. 476 (C. C. A. 8).

Attention is now directed to a series of cases which, it is submitted, correctly apply the rules to which reference has been made.

A leading case, and one frequently cited, is *Stubbs vs. United States,* (C. C. A. 9th) 249 Fed. 571. The rule enunciated in that case is more precisely stated in the cases about to be discussed. The assumption is that the court will want to study the case in all its multiple ramifications.

In *Linde vs. U. S.,* 13 Fed. (2d) 59 (C. C. A. 8), one Linde and Brown were indicted under the same penal statute with which we are here concerned. The facts pertinent to our inquiry are noted in the opinion from which we quote:

> "In this indictment Linde, Brown, and Winter alone are named. It would appear that at the time it was returned the full scope of the conspiracy was not fully known; but in the indictment others, whose names were to the grand jurors unknown, were alleged to be parties to this conspiracy. One of the main assignments of error is that the evidence as insufficient to connect these three defendants with the conspiracy, and with knowledge that the stolen cars involved were, or were to be, transported in interstate commerce. With respect to the defendants Linde and Brown we think the point is well taken. A careful consideration of the entire record convinces us that it fails to disclose any further connection with the scheme, although the existence of such a scheme and plan is abundantly established, than the receipt of a car by each of these defendants for personal use, and without proof of knowledge of the interstate character of the transaction. *There are a number of circumstances which would lead to the suspicion that both Linde and Brown knew that the cars sold or*

traded to them were stolen cars, but it does not appear that they knew whence they came, or were to come, nor that they were parties to any general plan or conspiracy having as its object the introduction of such cars from without the state for purposes of disposition and sale. *That they may have had guilty knowledge and participation rests upon suspicion only, arising from their acquaintance and association with some or all of the other conspirators; but to establish a conspiracy to violate a criminal statute the evidence must convince that the defendants did something other than participate in the substantive offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement, and in this case, in our judgment, that proof is insufficient. United States vs. Heitler et al.,* (D. C.) 274 F. 401; *Stubbs vs. United States,* (C. C. A. Ninth Circuit) 249 F. 571, 161 C. C. A. 497; *Bell vs. United States,* (C. C. A. Eighth Circuit) 2 F. (2d) 543.

"As to these two defendants, it is therefore unnecessary to consider the other errors assigned."

In *Dickerson vs. U. S.*, 18 Fed. (2d) 887 (C. C. A. 8) certain defendants were charged on conspiracy counts under Section 88, Title 18, U. S. C. A., for violation of the National Prohibition Act. The court gave repeated emphasis to the fact that from the record it did not appear that any of the alleged conspirators had informed the defendants in error of the terms of the conspiracy. In other respects the said defendants were closely identified with certain of the admitted conspirators in actual dealings with them in the business of the conspiracy while the conspiracy was in process. The

facts are detailed beginning at page 85 of the Appendix of this brief. The court held:

> *"Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.* To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement. *Linde vs. U. S.,* 13 F. (2) 59 (C. C. A. 8th Cir.); *U. S. vs. Heitler et al.,* (D. C.) 274 F. 401; *Stubbs vs. U. S.,* (C. C. A. 9th Cir). 249 F. 571, 161 C. C. A. 497; *Bell vs. U. S.,* (C. C. A. 8th Cir.) 2 F. (2d) 543; *Allen vs. U. S.,* (C. C. A.) 4 F. (2d) 688; *U. S. vs. Cole,* (D. C.) 153 F. 801, 804; *Lucadamo vs. U. S.,* (C. C. A.) 280 F. 653, 657. . . . The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy. *Iponmatsu Ukichi vs. U. S.,* (C. C. A.) 281 F. 525."

This Court in *Kuhn vs. United States,* 26 Fed. (2d) 463 (C. C. A. 9) made application of the same doctrine in its opinion by Judge Dietrich, in which the learned judge observed:

> "Upon a re-examination of the record, we have concluded that we were in error in holding the evidence sufficient to warrant a finding beyond reasonable doubt that the defendant Moon participated in the enterprise, with knowledge of its unlawful character. The most material circumstance

> against him is that he was on or about the Talbot the night the arms were taken on board. But they were in boxes or cases, and he may very well have been ignorant of the contents, or of their destination. *We think, too, we failed to attach due significance to the fact that Borreson, who freely gave evidence for the government, at no time testified that there was any communication to Moon touching the real object of the voyage.*"

To arrive at a conclusion of guilt upon the facts here appearing, circumstances would have to be presumed which are without support in the record. Facts warranting conjecture or suspicion are not sufficient, as we have endeavored to show. Evidence warranting a suspicion or an hypothesis of guilt is not substantial evidence. A presumption of fact arrived at by piling inference upon inference, and presumption upon presumption will not be recognized in either civil or criminal cases. Interesting cases in which the Federal courts have exposed the vice in reasoning of this sort, are:

> *United States vs. Ross,* 92 U. S. 281, 284; 23 L. Ed. 707; *Brady vs. United States,* 24 Fed. (2d) 399 (C. C. A. 8); *Gargotta vs. United States,* 24 Fed. (2d) 399, and cases cited.

It is respectfully submitted that there is an absence of any substantial evidence sufficient to warrant conviction upon Count 7 of the indictment.

COUNT VIII

There is no substantial evidence in the record sufficient to sustain the conviction on Count 8 of the indictment.

The facts relative to Count 8 correlate pretty well in general outline with those offered in support of Count 7. The question of knowing participation by the defedant in the fraudulent scheme as alleged in Count 4 of the indictment, looks for solution to the evidence received in support of Counts 4 and 8 as a unit.

We have heretofore discussed the quesion of the sufficiency of the evidence to establish the requisite intent to use the mails as an essential ingredient of the conspiracy. So likwise, what has been said with reference to the rules of law pertinent to an evaluation of the evidence received in support of Count 7, is equally pertinent to a consideration of this count.

We proceed now to a brief analysis of the testimony upon which it will be contended in this Court, as it was contended at the trial, that the defendant with full knowledge participated in the fraudulent scheme. This evidence falls into two groups, to wit: (1) That relating to the Wagner transaction consummated in 1925, and (2) certain statements made by the defendant to the witness Nelson and to police officers. The Wagner transaction will be discussed in some detail under assignments of error numbered 2, 3, 4 and 5, and reference is made thereto beginning at page 59 of this brief.

Reference is made to the colloquy between the witness Nelson and the defendant, appearing at pp. 51, 52 of the record. Thereat the witness testified that "with relation to the cashing of checks" that might be sent by Nelson to the defendant that there was only one time when the matter was discussed between them and that was in 1935. At that time the defendant told Nelson that "10% wasn't enough," that "the checks were getting a little hot and he would have to have more commission." The record does not show whether this conversation was held prior or subsequent to the transactions alleged in the indictment and testified to by the witnesses.

The fact that the defendant cashed some checks for Nelson, and that he discounted the checks for doing so, is not evidence of participation by the defendant in the fraudulent scheme alleged in the indictment. Nelson was part of the time a gambler, part of the time a hotel operator, part of the time an eye racqueteer. There is no suggestion in this evidence that the checks to which reference was made in the colloquy, were received by Nelson pursuant to the particular fraudulent scheme alleged in the indictment.

The statement by the defendant that "the checks are getting a little hot" only carries the inference that for some reason not shown by the record, the checks were to be questioned. The checks might have been thought by the defendant to be "hot" for any one of a thousand

reasons. The defendant knew Nelson to be a gambler, and lacking in quilities which go to the making of good citizenship.

It should be observed that after testifying to the above, and at pp. 57 and 58 of the record, Nelson testified that at no time did he ever discuss the fraudulent scheme with the defendant; "I don't remember having any discussion with him in that regard; I don't think we ever did discuss it."

So far as the record shows, the defendant's only contact with the alleged conspirators was through Nelson. If Nelson didn't tell him, who did? The police didn't tell him; the postal inspectors didn't tell him. It is unfair of the prosecuting officers to expect the defendant to exercise psychic powers and read the minds of the conspirators. It would require a whole series of inferences, one to be built upon the other, to arrive at a conclusion that because the defendant thought the checks were getting "a little hot" they had obtained that status from being procured in the particular fraudulent scheme alleged in the indictment. See cases cited supra, page 54 of this brief.

The witness Nelson testified at page 60 of the record that the "only conversation" he ever had with the defendant concerning the means by which Nelson made his livelihood, was on several occasions between 1929 and 1935, at which the defendant queried: "How are

the suckers, Slats? Are you making any big sales?" Again we inquire, what suckers? Nelson didn't answer his queries. He maintained on these occasions as he had on all others when he talked with the defendant, a stoical silence regarding the fraudulent scheme. He was not telling the defendant or anyone else about his fraudulent scheme. It was but natural that he should deceive the defendant and obscure his fraud from him, as he would from the police. Had not the defendant at all times cooperated with the police in the making of their investigations; given accurate descriptions of Nelson and of Dr. Brown; told them in 1935 that "about 16 years ago" Nelson had been engaged with Dr. Brown in the eye frauds; that Nelson was a gambler—all of which was true, and all of which would serve as invaluable clues directed to the apprehension of Nelson.

It is clear from the record that the defendant didn't trust Nelson. On the two occasions when the checks were brought to him, he refused to cash them, but did consent to send them through for collection. That he thought the checks might not be good, does not warrant an inference that the defendant knew the particular checks were obtained in the particular fraudulent scheme alleged in the indictment. *Lonabaugh vs. U. S.,* supra.

Upon a fair construction of the evidence, all entirely circumstantial, it is submitted that the record not only bristles with hypotheses connoting the innocence of the

accused, but affirmatively shows that the defendant was not aware of the fraudulent scheme alleged. At the very most, this evidence cannot rise above bare suspicion and loose conjecture.

In concluding this phase of the argument, attention is directed to the propositions and authorities presented in respect to Count 7 which are applicable here and which have been simply referred to to avoid duplication.

II

ASSIGNMENTS OF ERROR NUMBERED II, III, IV AND V

These four assignments all relate to the reception in the evidence of testimony of various witnesses, and an exhibit (No. 7) all concerning an alleged fraudulent transaction perpetrated in 1925 upon one Wagner. Due to their length, they are set forth in full in the appendix, beginning at page 71. Objections were made on the ground that the transaction occurred thirteen years prior to the date of the alleged conspiracy, and evidence in respect thereto was therefore too remote; that the transaction was not st forth in the indictment; that there is an absence of any testimony connecting the accused with said fraudulent transaction. Exceptions were taken to the ruling of the court.

The four errors assigned rest upon common ground. All were admitted, it appears, upon a single theory governing their admissibility.

The testimony and the Exhibit No. 7 noted in said assignments were inadmissible because they were too remote to have evidential value, and because the transaction to which they relate was not connected with the offenses charged in Counts 4 and 8 of the indictment.

The basis for the general rule rendering evidence of other and similar offenses inadmissible is well stated by Mr. Justice Peckham as follows:

> "To adopt as broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime which it cannot be supposed he is or will be in proper condition to meet o rexplain and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence."

The quotation is obtained from the case of *State vs. Wilson,* 113 Ore. 450, 233 Pac. 259.

The rule is stated in some of the cases, however, that where fraudulent intent is one of the material allegations in the indictment, evidence of other and similar ventures by the accused at or about the same time, is properly admissible on the question of intent. The rule as thus enunciated has been applied in cases involving use of the United States mails to defraud. *Samuels vs. U. S.,* (C. C. A. 8), 232 Fed. 536; *Riddell vs. U. S.,* 244 Fed. 695, 700 (C. C. A. 9); *Shea vs. U. S.,* (C. C. A. 6) 251 Fed. 440. In *Packer vs. U. S.,* (C. C. A. 2) 106 Fed. 906, it was held that a similar business transaction con-

ducted by the accused within a year to those charged in the indictment, was not too remote to be proved.

Much is left to the discretion of the trial judge. *Hendry vs. U. S.,* 233 Fed. 5, 13 (C. C. A. 6). But the other offenses on which evidence is offerd must be so nearly related in time and place as to have some tendency to prove the commission of the crime charged. *Sutherland vs. U. S.,* 92 Fed. (2d) 305, 306 (C. C. A. 4). A conspiracy is not an omnibus charge under which you can prove anything and everything and convict of the sins of a lifetime. *Terry vs. U. S.,* 7 Fed. (2d) 28, 30 (C. C. A. 9). In *Cooper vs. U. S.,* 9 Fed. (2d) 216 (C. C. A. 8), it was held that in a prosecution for conspiracy to defraud the government by filing false tax returns, admission of testimony that nearly two years prior to the conspiracy charged, one of the defendants asked a witness to charge inventory by cutting it in two, was error. Likewise, in *Jay vs. U. S.,* 35 Fed. (2d) 553, 554 (C. C. A. 10), the court held:

> "Counsel for the defendants contend that the court erred in admitting over their objection, testimony concerning the trunk transaction and the sale to Blairs, on the ground that such transactions took place prior to the formation of the alleged conspiracy and were independent and isolated transactions which had no bearing on the crimes charged in the indictment. We think this contention is well taken. The proof did not establish a conspiracy prior to March, 1927. The evidence was prejudicial and the conviction upon the conspiracy counts must be set aside."

With the foregoing general statements of the rule in mind, attention is directed to the testimony mentioned in the assignments and the summary of the evidence beginning at page 7 of this brief.

The Wagner transaction occurred in 1925, thirteen years prior to the return of the indictment, and ten years prior to the first subsequent incident, in which the defendant cashed a check for the conspirator Nelson. This was the Belter check received on or about September 20th, 1935. The Wagner check, which was cashed by the defendant, was a cashier's check and it was not discounted. The defendant employed an attorney to attempt collection thereof. Immediately following the incident, Nelson left "this part of the country" and did not return until 1931, and he had not seen the defendant in the interim period. The record does not show a course of dealing and a continuous series of transactions which might render the testimony admissible under the rule of this circuit announced in *Ketterback vs. U. S.*, 202 F. 377. There is an absence of the necessary connecting proof. *Schaffer vs. Commonwealth*, 72 Pa. St. 60, cited in *State vs. Wilson*, 113 Ore. 450, 464, is in point:

> "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed

the one must have done the other. Without this obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiple issues that tend to confuse and mislead the jury."

The testimony and the exhibit included in the assignments were inadmissible because the same evidenced a different conspiracy from that charged in the indictment.

The conspiracy existing in 1925, with Brown and Nelson as the participants therein, was not the same conspiracy charged in Count 8 of the indictment which is alleged to have had as parties the defendant, Nelson, Londergan, and other divers persons. Nelson left the country presumably with Brown and subsequently died. In 1929 Nelson was in the hotel business for about a year; at other times he was in the penitentiary. There is an absence of any testimony showing the existence of a conspiracy between 1925 and 1935. Nelson could not conspire with himself. The conspiracies had separate identities, and the fact that Nelson was a participant in both and that they were both directed to a common end does not affect their status as such. *Terry vs. U. S.,* 7 Fed. (2d) 28, 30 (C. C. A. 9).

To be admissible in evidence, the acts of a co-conspirator must be done while the conspiracy is pending and in furtherance of its object. *Brown vs. U. S.,* 14 S. C. 27, 39, 150 U. S. 93, 98, 37 L. Ed. 1010; *Lane vs. U. S.,* 34 Fed. (2d) 413, 416 (C. C. A. 8). The acts of

a co-conspirator prior to the formation of the conspiracy are not admissible against his co-conspirators. *Minner vs. U. S.*, 57 Fed. (2d) 506, 511 (C. C. A. 10); *Marcante vs. U S.*, 49 Fed. (2d) 156, 157 (C. C. A. 10). In *Wyatt vs. U. S.*, 23 Fed. (2d) 791, 792, it was said that when, as here, one large conspiracy is specifically charged, proof of different and disconnectd smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others *conspiring to do the thing forbidden,* sustain conviction. See also, *Terry vs. U. S.*, supra, to the same effect.

III

ASSIGNMENT OF ERROR No. VI

This assignment of error, which is set forth in the appendix because of its length (beginning at p. 78), relates to testimony given by the witness John M. Gray concerning declarations made by a co-conspirator, Roy L. Martin, out of the presence of the defendant. Objection was made upon the ground that there was no sufficient or any prima facie showing of the defendant's connection with the conspiracy charged in Count 7 of the indictment, and on the further ground that no sufficient foundation was laid for the introduction of any statements or declarations made by the said Martin out of the presence of the defendant. Exception was saved to the rulings of the court.

The testimony noted under Assignment of Error No. 6 was inadmissible because the declarations made by the co-conspirator, Martin, were made out of the presence of the defendant and were not made in furtherance of the objects of the conspiracy.

The full substance of the testimony upon this feature of the proof is set forth in the assignment of error so the objectionable declarations may be viewed in relief against the background of the evidence.

The portions particularly objectionable are as follows:

"Q. What did Martin tell you as to what he had done with the Mershon check?

A. My conversation with Roy Martin was that he mailed the check to Joe Mazurosky.

"Q. And did he tell you anything about the arrangement with Joe Mazurosky? What did he tell you?

"A. It would cost me fifteen per cent to get the check cashed through Joe Mazurosky. (Referring to the Allen check.) He told me he could send it to Portland for collection and it would cost me fifteen (15%) per cent."

The first two of the declarations were obviously not in furtherance of the objects of the conspiracy. The check had already been sent by Martin to the defendant prior to the time the statements were made by Martin. Martin was given complete control over the check. The declarations were simply narrative of a past event. Such declarations are not competent and are highly

prejudicial. *Mayola vs. United States,* 71 Fed. (2d) 65 (C. C. A. Ninth); Garrecht, C. J.)

The declarations noted under this Assignment of Error were incompetent because the declarations of one co-conspirator to another are not competent to establish the connection of a third person with the conspiracy.

It will be recalled from the record that Roy L. Martin was the only one of the alleged conspirators who was known to and by the defendant. Of the parties making up this conspiracy, to-wit: Crangle, Gray, Andrews, and Martin, the defendant knew only Martin so far as the record shows. It was Martin who knew that the defendant would cash the two checks and it was Martin who sent the checks to the defendant. The witness and co-conspirator, Gray, was not acquainted with the defendant and he so testified. There is not a syllable of evidnce suggesting that the defendant had any contact whatsoever with the other alleged conspirators.

Upon this state of the record it will readily appear that the declarations of Martin as testified to by the witness Gray, afforded the only link by which it was sought to connect the defendant with participation in the conspiracy.

The rule is established in this circuit beyond permissible controversy that the declarations of one conspirator to another are not competent to establish the connection of a third person with the conspiracy.

Mayola vs. U. S., supra; *Kuhn vs. U. S.,* 26 Fed. (2d) 463 (C. C. A. Ninth).

The testimony noted under this assignment of error was inadmissible because there is an absence in the record of any independent evidence showing that the conspiracy existed and that the accused was a party to it at the time the declarations were made.

Reference is made to the summary of the evidence relating to Count 7 of the indictment, beginning at page 18 of this brief. Without the declarations of the co-conspirator, Martin, there is an absence of any evidence showing the defendant's alleged connection with the said conspiracy or with any of the members thereof. For that reason, the declarations of Martin, being the ones particularly set forth above, and the others noted in the assignment, were objectionable and prejudicial. *Mayola vs. U. S.,* supra; *Kuhn vs. U. S.,* supra.

The declarations were peculiarly vicious and prejudicial under the state of this record because their admission served to qualify the receipt in evidence of the Allen and Mershon checks. The evidence showed that the defendant cashed the two checks obtained in each of the conspiracies. Since defendant's only participation, under any theory of the case, is found in the cashing of these checks, the receipt in evidence of the Mershon and Allen checks served to double the quantum of evidence on this material feature of the case.

Under the rule of Kuhn Case, supra, the jury should have been instructed to disregard all testimony received in support of Count 7, for the reasons heretofore assigned. That the receipt of this volume of testimony cast a blight upon the whole case, there can be no doubt. It was loaded with prejudice and this court so held, by analogy, in the Mayola Case, supra.

The legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect. *Deery vs. Cray,* 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Peck vs. Heurich,* 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; *Todd vs. United States,* 221 Fed 205, 208 (8th); *Crawford vs. United States,* 212 U. S. 183, 203, 53 L. Ed. 465, 29 S. C. 260.

CONCLUSION

The record is made up in large measure of the testimony of old people who had been defrauded by the two groups of conspirators. The case, by reason of this fact, was heavily freighted with emotional substance. Juries in such a circumstance require a scape-goat and not infrequently convict the innocent. See Pro. Borchard's work: "Convicting the Innocent," Yale University Press 1932. The explanation is found in the fallible

quality of circumstantial evidence as an instrument of proof.

It is respectfully submitted that the judgment should be reversed on the several counts of the indictment.

Respectfully submitted,

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APPENDIX

ASSIGNMENT OF ERROR No. 2

That the Court errer in permitting the witness for the United States of America, Mr. Frank Nelson, to testify as follows:

Questions by Mr. Dillard: [139]

"Q. How did Mr. Wagner happen to give you a check for Five hundred ($500.00) Dollars?

"A. I called on Mr. Wagner at his home——

"Mr. Biggs: Just a moment, the defendant objects to the introduction of any testimony concerning the manner or means or time or place of the taking of that check. It is now shown to be set up in the indictment. It is not the basis for one of the charges made in the indictment; it is dated, as already identified, some thirteen years prior to the indictment and some nine years prior to the date the alleged conspiracy commenced, and therefore is too remote to be admitted under the theory of any similar transactions, if that is what is claimed for it.

"Mr. Dillard: It is offered, Your Honor, to show knowledge on the defendant. It will develop that—well, it is offered to show knowledge.

"The Court: The Court will admit the testimony in view of the matters that have been already testified regarding Government's Exhibit 7.

"Mr. Biggs: May we have an exception to the Court's ruling?

"The Court: Yes.

"Frank Nelson: I came into possession of the Wagner check, Exhibit 7, under the following circumstances: I called on Mr. Plummer at his home, introduced myself as a local optometrist from Vancouver, Washington, examined his eyes and told him that he had a trouble that I really didn't understand myself, that he should consult an eye, ear, nose and throat specialist, and I asked him if he knew anybody in Vancouver or Portland that he was personally acquainted with that he cared to go see, and he said that he didn't; so I told him about a party that was with me that was an eye specialist and that if he would go out and ask him to come in that he might give what information he needed, so he did that. I told him my partner (Dr. Brown) was Dr. Ainsworth. He called Brown into the house and Brown [140] performed an operation for him on his eye. At that time we were using the skin of an egg. He put that on the eye and removed it from the eye, and showed it to him and charged him Six Hundred Seventy-five ($675.00) Dollars, I think it was. We got two checks, one for One Hundred Seventy-five ($175.00) Dollars, and one for Five Hundred ($500.00) Dollars. The one for $175.00, Dr. Brown cashed at one of the banks in Vancouver, Washington. I took the other Wagner check to another bank and he refused to cash it, but the banker certified the check. I am referring now to Exhibit 7 for identification. When he refused to cash the check, I gave it to my

partner, Dr. Brown, and from that day until last year I never saw the check any more. Dr. Brown was a friend of Mr. Mazurosky as well as myself. He was the gentleman who had the store next door to Mazurosky's store, the optical store."

ASSIGNMENT OF ERROR No. 3

That the Court erred in permitting reception into the evidence of Exhibit numbered 7, offered and received in behalf of the United States of America under th following circumstances:

Questions by Mr. Dillard:

Mr. Dillard: If Your Honor please, we will offer in evidence Government's Exhibits for identification 4, 5, 7 and 26.

Mr. Biggs: If the Court please, the defendant objects to the introduction of these checks on the ground and for the reason that there has been no evidence sufficient to connect the defendant with the manner and method and means by which these checks were taken or for any other purpose, and I assume they would be immaterial if they were not offered for the purpose of connecting the defendant with that transaction; as to Exhibit 7, on the further ground and for the further reason that it is in connection with a transaction occurring more than thirteen years prior to the date of the offer, and upon that ground it is too remote to have probative force.

The Court: All these checks have the defendant's signature and they are admissible in evidence. Admitted. Exception allowed.

(The documents heretofore marked Government's Exhibits 4, 5, 7 and 26, respectively, for identification were thereupon received in evidence.)

There was thereupon received in evidence, Exhibit of the United States of America, numbered 7, which is in words and figures as follows, to-wit:

GOVERNMENT EXHIBIT 7

98-37

Vancouver, Wash., Nov. 14, 1935

Washington Exchange Bank

Payment stopped.

Pay to the
Order of O. A. Plummer $500.00
Five Hundred 00/100 Dollars
Exactly Five Hundred Dollars Exactly Exactly

HENRY WAGNER

Good for $500.00
When properly endorsed
Lloyd DuBois
P. M.
Nov. 18, 1925

(Endorsed on Back) O. A. Plummer O. A. Plummer
Henry Wagner C-15297
O. A. Plummer
Joe Mazurosky Cancelled
786 Kearney St.
Be 5581 [142]

ASSIGNMENT OF ERROR No. 4

That the Court erred in permitting the witness for the United States of America, Mr. Henry Wagner, to testify as follows:

Questions by Mr. Strayer:

Q. Mr. Wagner, will you just tell the jury the circumstances under which you made out and delivered that check?

Mr. Biggs: If the Court please, we object to the introduction of this testimony on the ground that it was to do with a transaction in the absence and not in the presence of this defendant, there being no sufficient foundation made connecting the defendant with the transaction or showing knowledge of the transaction.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Exception allowed.

Mr. Biggs: Could a continuing objection to this testimony go on, Your Honor, to prevent the necessity of instant interruption?

The Court: You will have to object to the testimony of each witness.

Mr. Biggs: But it may be a continuing objection?

The Court: As far as the testimony of the particular witness.

Mr. Biggs: Thank you.

There were two men came to my farm on the 14th day of November, 1925, who said they were eye doctors

that tried to sell us glasses. I wasn't in need of any glasses, but my brother, William, did need them; his eyes were failing and they examined his eyes and discovered that there was something wrong and finally found it was a cataract—told him it was a cataract, and said that it would have to be removed or else he would go blind, and so he submitted to the operation to remove the imperfection in his eye. Before they did that I asked them what it would cost to remove it and they said it would be nominal, the price would be nominal, and so they went to work and removed it and when they got through the bill was Seven Hundred Fifty ($750) Dollars.

They had an instrument about a foot long, a sort of rod, and they worked around in his eye with that and removed something that looked like the white of an egg, and they called that the cataract. That was the operation that was performed. [143] These parties were using the names of Dr. O. A. Plummer and Dr. J. C. Ainsworth. Mr. Plummer was a tall, slim man, rather dark, about 35 or 40 I should judge. I believe I saw him today. The other wasn't near as tall, was older, heavy set with a sloping forehead at a conspicuous angle. The older man performed the operation. When they said they wanted $750.00 I objected. They said radium was used to remove the cataract and that the value of the radium used in the operation was Six hundred fifty ($650.00) Dollars. They reduced the bill to Six hundred fifty ($650.00) Dollars and I wrote out

two checks, this one and another for One hundred seventy-five ($175.00) Dollars. The checks were handed over to Mr. Plummer. I did not see them after I delivered the checks. One of the checks was *cased,* the $175.00 one. I next saw the $500.00 check at Mr. Dubois' in the bank." [144]

ASSIGNMENT OF ERROR No. 5

That the Court erred in permittong the witness for the United States of America, Mr. William Wagner, to testify as follows:

Questions by Mr. Strayer:

My name is William Wagner, brother of Henry Wagner, and we live near Vancouver, Washington. I recognize the check you have handed me, Exhibit 7 for identification.

Q. Do you recall the circumstances under which that check was made out and delivered?

A. Yes, sir.

Q. Will you just tell the jury about it?

Mr. Biggs: If the Court please, for the purpose of the record we object to the introduction of this testinony on the grounds assigned with respect to the testinony of the brother.

The Court: The objection is overruled.

Mr. Biggs: And that will go to all the testimony on he further ground of remoteness?

The Court: Overruled. Exception allowed.

Mr. Strayer: Q. Tell us the circumstances under which your brother made out and delivered that check.

Well, this check was written for eye doctors. There were a couple of them, Plummer and Ainsworth, and they examined our eyes and told me I had a cataract on one of my eyes and if it wasn't removed I would go blind in a short time. It scared me, of course, and it scared my brother, and we issued this check in payment for the operation. The check was made out by my brother in my presence. The check was delivered to Plummer. The check was nver paid. I have seen neither of the men since then. The operation didn't help me "one bit." [145]

ASSIGNMENT OF ERROR No. 6

That the Court erred in permitting the witness for the United States of America, Mr. John M. Gray, to testify as follows:

Questions by Mr. Strayer:

Q. What did Martin tell you as to what he had done with the Mershon check?

Mr. Biggs: If the Court please, we object to the witness answering that question on the ground that it would be hearsay, there being no sufficient or any prima facie showing of any partnership in crime or otherwise between Mr. Martin and Mr. Mazurosky, and therefore no sufficient foundation laid for the intro-

duction of any statements, declarations, or evidence of any acts of omission or commission done in the absence and out of the presence of the defendant.

The Court: The objection is overruled.

Mr. Biggs: And may we have an exception?

The Court: Yes.

A. My conversation with Roy Martin was that he mailed the check to Joe Mazurosky.

Mr. Strayer: Q. And did he tell you anything about the arrangement with Joe Mazurosky?

Mr. Biggs: If the Court please, may we make the same objection and have the continuing objection to any testimony asked for and given by this witness in connection with statements or evidence of facts or declarations on the part of Martin?

The Court: Yes.

Mr. Biggs: I make the same objection at this time, Your Honor.

The Court: The objection is overruled.

Mr. Biggs: And may I have an exception?

The Court: An exception is allowed.

Mr. Strayer: Q. What did he tell you?

A. It would cost me fifteen per cent (15%) to get the check cashed through Joe Mazurosky.

As I previously stated, my arrangement with Mrs. Martin was that she would go down with me to Joe Mazurosky's and we would obtain this money and I would take my part of the money and Mrs. Martin was to keep his part of the money. [146]

Q. And under your agreement with Martin what percentage of the check were you to receive?

A. I received a total of sixty (60%) per cent.

Q. And what was to be done mith the balance of the money?

A. Fifteen (15%) per cent would go to Joe Mazurosky for collection, twenty-five (25%) yer cent to Martin and Cragle, and sitxy (60%) per cent to Nelson and myself.

We were paying Martin and Crangle twenty-five (25%) per cent for advance information concerning these people.

Referring to the time when I received the Mershon check on October 29th, after having a conversation probably one or two days previous to that with Mr. Martin and Mr. Crangle, they told me circumstances of a fake cataract operation on Mrs. Mershon, or Mr. Mershon, one or the other of them. I went to the home of these people on this date and made an examination of the party that was supposed to be operated on, I don't recall which one now. I remember explaining that I was there for the purpose of giving them back the money in the event that it wasn't cured, that the doctor that operated on them had had an accident of some kind and probably was killed; anyhow, after my examination I told them it wouldn't be cured without the use of a radium belt and explained to them a radium belt was very valuable, only twelve of them in the United States; the doctor that made them had died with

the secret. The windup of the conversation was that they deposited this amount of money with me as surety, one of these belts to be delivered to their home and used for a period of thirty days, and that is how I obtained the check.

To my knowledge there was no such thing as a radium belt. There was nothing more the matter with these people than senility or old age. At the time I talked with them I was using the name, Dr. Pierce. I also went by the names of Miles, Hamilton, Howard, Clayton, Cox and others. I understood that the name T. A. Andrews was the correct name of the party who was with me. He also went by the name of Thomas, Judge Thomas, and I so introduced him to the Mershons. I represented Thomas as an attorney, settling the estate of the doctor ho had been killed and who had performed the operation on their eyes. Thomas is at this time in a Federal Penitentiary in Virginia. I understand Roy Martin and Herbert Crangle are in the Federal Penitentiary at Atlanta, Georgia. Crangle usually went by the name of Dr. Avery. Martin, when performing the operations, usually was represented as Dr. Miles.

Referring back to the time when I received the proceeds of the Mershon check, I will state that I met Mr. Mazurosky about a week thereafter, for the first time. I was introduced to him by Roy Martin at the St. Andrews Apartment Hotel in Portland, Oregon.

Q. And what were you doing there at the St. Andrews Apartment Hotel?

A. Mr. Martin was living there at the hotel. I was down there to see him and I just met Mr. Mazurosky, that is all.

The Allen check, Exhibit 3 for identification, which you have handed me was received by me sometime in September, 1934. I went to the home of Clara Allen and her brother somewhere around Boulder, Colorado. The exhibit is a cashier's check.

Mr. Strayer: Q. And how did you receive possession of it?

A. T. A. Andrews and I drove to the home of Clara Allen and her brother, out of Boulder, Colorado, and I talked to Miss Allen and her brother and performed a so-called fake cataract operation on the brother's eye and went to town to get this money. She drove her car and we followed in another car. She didn't have the money in the bank. They had some Liberty bonds and these were at the bank in the name of the brother and she couldn't obtain these bonds, so she had to go back home and get an order for them, and it was then too late to get the bonds out of the bank that day so I instructed her to go the following day and get the bonds or the cash money and I would be back in a few days to get it, but I didn't. I waited a couple of weeks and I sent Mr. Andrews out there early on Sunday morning. That day he returned with the check and gave it

to me. I received the check from T. A. Andrews about twelve or fifteen days after the date noted on the check. I was working with Andrews at that time.

I performed the operation on Miss Allen's brother. Due to senility, his vision was dim and I explained to him that I could make him see with radium treatment. I dropped a few drops of Murine eye water into his eye and removed a piece of skin that I had—I was supposed to have removed it—and that was all there was to it. He did have a cataract but I did nothing about it. The check was given me in payment for the operation. I was using either the name of Miles or Pierce, I am not sure which. Andrews was using the name of Thomas. Miss Allen's brother received no benefit from the operation. After receiving the check, I gave it to Roy Martin. He told me he could send it to Portland for collection and it would cost me fifteen (15%) per cent. He told me he was going to send it to Joe Mazurosky. He wrote him a letter and put it in an envelope and dropped it in a mail box in Denver, Colorado. After he mailed the letter, I later received the proceeds of the check. Mr. Martin gave me Five Hundred ($500) Dollars less fifteen (15%) per cent, which is Seventy-five ($75) Dollars, in Seattle—a few dollars less than that because he told me that the money had been wired to him. That was about the first or second week in October, 1934. I went back to see Miss Allen in 1935. When I was there the first time they had two thousand dollars in Liberty bonds and I went back there to get the

balance of them if I could. I talked to Miss Allen; found her in the cow pen milking a cow. It was early in the morning. I went in and talked to her and she didn't recognize me. As soo as I began to talk about eyes she told me she had been swindled out of Five Hundrd ($500) Dollars and if I would go down town and talk to the district attorney he would tell me all about it, and so that was all I wanted to know and I drove away. She did not recognize me as one of the men who had been there before. I wore no disguise.

(The check, Government's Exhibit 15 for Identification, was thereupon marked.)

The first time I ever saw the exhibit marked Government's Exhibit 15 for identification was at the trial in Portland. I can't say that I recognize the handwriting. When Martin sent the checks to Joe Mazurosky, he used the name of R. E. Terrell.

DIGEST OF PERTINENT FACTS

Dickerson vs. United States, 18 Fed. (2d) 887:

"After a careful consideration of the record, we are satisfied that the evidence upon which the government must depend to connect the plaintiffs in error with the conspiracy is that *they bought some of the liquor,* and that at the time the alcohol was being taken away from the Red Line Transfer & Storage Company building at Des Moines on the 20th of March, 1923, *it was said by Chapman* (who had been employed by the original conspirators, after the alcohol had arrived from Peoria at Des Moines and had been removed from the car and stored in the Red Line Transfer Company's building to sell it) *in the presence of the plaintiffs in error, that the alcohol had come from Peoria, and the further testimony that each of the drums bore the legend: 'Complete denatured alcohol, proof 188. Kentucky Distilleries & Warehouse Company D. P. 141st Dist. Ill. Formula 5 I. C. C. 10.'*

The claim made by the government, and stated in their brief, that the plaintiffs in error were present when the car of alcohol came in from Peoria and was unloaded, is not borne out by the evidence. While Kelso, the witness, at first stated, he afterwards changed his testimony and said he was mistaken about that. *The most that can be said of this testimony is that it conveyed knowledge to the plaintiffs in error that the alcohol had been shipped from Peoria to Des Moines.*

The testimony of Kelso on this point is very weak, but, assuming it to be true, we do not think it is sufficient to charge the plaintiffs in error with knowledge of the conspiracy. *The record shows very clearly that the plaintiffs in error had never*

taken any part in the general conspiracy or scheme and never knew of its existence, never participated in the profits or took any part in it in any manner, unless this can be inferred from the mere fact that at the time that the alcohol was delivered to them, some days after they had paid for it, they acquired the knowledge that the alcohol had been shipped from Peoria. There is, of course, the further fact that they purchased a large quantity of the alcohol from one or more of the conspirators. The evidence introduced by the government shows clearly that neither Hunnell nor Chapman, nor any of those who had to do with selling the liquor to the plaintiffs in error, gave them any information whatever concerning the conspiracy, or even as to where the liquor had come from.

This is the sum total of all the evidence upon which the government must depend to connect the plaintiffs in error with the conspiracy. The other evidence in the record touching this point is affirmative evidence introduced by the government to the effect that none of the conspirators who dealt with the plaintiffs in error informed them of the conspiracy or anything about it. . . .

It will further be observed that Chapman was not in on the deal at all until after Hunnell and Schaller had been unable to dispose of the product, and it is Chapman whom the witness Kelso testified made the remark at the Red Line Transfer & Storage Company on the 20th of March, 1923, that the car had come from Peoria. *As to the plaintiff in error, Eaton, the record is without dispute that he was not only not informed by any of the conspirators, but that he himself made inquiry of Berg if there was alcohol in the warehouse for sale, and Berg then called Schaller, and got Schaller's consent to sell two drums of alcohol to Eaton."*

No. 8809

In the United States Circuit Court of Appeals

For the Ninth Circuit

JOE MAZUROSKY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Oregon.

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Upon Appeal from the United States District Court for the District of Oregon.

•

STATEMENT OF FACTS

The appellee accepts appellant's introductory statement concerning jurisdiction of the court and summary of the three counts of the indictment upon which the defendant below was convicted. However, it is respectfully submitted that the summary of

evidence contained in appellant's brief is manifestly inadequate. The appellee, supported by great weight of authority as set forth subsequently, proceeded against the appellant in a prosecution for violation of Section 338, Title 18, and Section 88, Title 18, U.S.C.A., with a substantial amount of direct evidence and with circumstantial evidence of great weight, all of which was unchallenged by any witness for the defense.

The Government prosecuted the appellant on the theory that the banks with which he did business became his agents in causing the United States Mails to be used and that he played a definite part in the scheme and conspiracies alleged by procuring the collection of checks obtained by the co-conspirators, by causing the checks to be forwarded through the United States Mails for collection.

Though appellant suggests that the evidence relating to the five counts of the indictment which were withdrawn from the jury would not be of assistance to the court, it is submitted, without need of authority, that all of the evidence in the record may be resorted to to find proof of the guilt of the appellant upon the two conspiracy counts and one substantive count in the indictment, considered by the jury.

The appellee, the United States of America, as revealed by the record, proceeded against Joe Mazur-

osky to show knowledge, intent to use the mails, intent to do a criminal act, and concerted action constituting a conspiracy, by showing in evidence the following:

During all of the period of time covered by the evidence the defendant was a business man, engaged in the pawnshop and jewelry store business in Portland, Oregon; he transacted business at three different banks within the City of Portland (Tr. 74, 109, 110, 119); he had a long and intimate acquaintance with an arch-swindler, whose true name was Frank Nelson (Tr. 50, 74, 80); Frank Nelson devoted all of his energy during the years 1931 to 1936 to practicing a cruel fraud upon aged and infirm people and had no other means of livelihood (Tr. 63); the fraud is vividly described in the testimony of one of the victims of it, namely: the witness H. F. Belter (Tr. 65), in which the swindlers performed an obviously and admitted fake operation to remove a cataract from the eye, and obtained from their victims large sums of money; if possible to obtain cash, they obtained cash; if impossible to obtain cash, they obtained a check made out to a fictitious person, allegedly a doctor; it is plain that these checks made out to fictitious persons could not be cashed by the swindlers at any legitimate place of business or bank; in the instant case the checks were obtained from victims in remote sections of Eastern Washington and as far east as Colorado; each check was

forwarded by the two groups of conspirators described in the indictment to Joe Mazurosky in Portland, Oregon, and he cashed each one, retaining a commission of 10% and 15%, as evidenced in the testimony of Frank Nelson, a co-conspirator (Tr. 64), and John Gray, a co-conspirator (Tr. 91).

The Government went back as far as 1925 to show that Joe Mazurosky, appellant, had knowledge of the scheme to defraud, as revealed by the testimony of the witness Henry Wagner (Tr. 69, 83), and further, to show that appellant had knowledge of the unlawful means by which the co-schemer and conspirator, Frank Nelson, alias "Slats" (Tr. 65) obtained checks from victims, made out to fictitious persons and readily accepted by appellant Mazurosky, though he at that time knew the true name of the prior endorsers on the swindled check, which is Government's Exhibit 7. Henry Wagner, a victim, described the fake eye operation to Mazurosky in 1925, and John Goltz, Portland police detective, interviewed the appellant in 1925; the fact of an interview by a police detective, without the detail of information furnished by the victim and the detective in 1925, was in itself sufficient to show knowledge of an unlawful scheme practiced by associates of the appellant and aided by the appellant, to the extent that he, as holder of the fraudulently obtained check, placed it in the hands of an attorney to enforce collection (Tr. 84) and later accepted the

sum of $1000 from the swindler, Frank Nelson (Tr. 52), "to square that check."

The appellant was on such friendly and intimate terms with Frank Nelson in 1931 that he went on a vacation trip with him for about four days and loaned Nelson money without security on numerous occasions (Tr. 60, 61).

The appellant was also acquainted with and in communication with another arch-criminal and conspirator practicing the same fraud upon aged victims, whose name was Roy Martin. In 1934 Roy Martin, John Gray, and T. A. Andrews were, with the assistance of the appellant, who cashed the checks obtained, practicing a scheme to defraud similar to that above described. In October of 1934 a check in the amount of $450 had been obtained from Christine Mershon (Tr. 99). In that particular instance a combination of the eye racket and a radium belt scheme had been used by John M. Gray, T. A. Andrews, and Roy Martin. Roy Martin, among other aliases, was using the name R. E. Terrill. Martin forwarded the Mershon check (Government's Exhibit 1) to the appellant Mazurosky, who cashed the same and deducted 15% as his commission. The check was made out to the fictitious payee, H. J. Pierce (Tr. 86-7). Mazurosky knew Martin as R. E. Terrill and disbursed money to him under that name in October of 1934 (Tr. 151) and again in July of 1936 (Tr. 149).

The appellant's own admission against his interest is that he called at the office of the Western Union Telegraph Company in Portland, Oregon, inquiring for telegraph money orders which may have been sent by him over the periods of 1934 and 1935 under his true name of Mazurosky or the assumed name of Morris (Tr. 130).

Further, to show knowledge of the scheme in which Mazurosky was participating in October of 1934, when Government's Exhibit 1, the Mershon check, was obtained by fraud by Mazurosky's co-conspirators, it will be noted that in December of 1934, two additional Portland police detectives interviewed the appellant to ascertain the identity of the prior endorsers on the Mershon check, Government's Exhibit 1. The appellant falsely stated to the detectives that the person from whom he received the check was a doctor and had purchased some goods from him (Tr. 104, 106), whereupon these detectives informed the appellant that the check which he had cashed was obtained in a "bunco" game. The swindle of the Mershon victims was in October of 1934 by John M. Gray and T. A. Andrews, aided by R. E. Terrill.

Mazurosky falsified to the police investigators concerning his knowledge of the identity of these swindlers of the Mershon check, because about thirty days before there had come into his possession a cashier's check in the amount of $500, obtained by

the same fraudulent scheme from Clara E. Allen, of Longmont, Colorado, on September 12, 1934, by the arch-criminal and co-conspirator John M. Gray, with aliases, and T. A. Andrews (Tr. 86, 95, 101). Upon receiving possession of that cashier's check in the amount of $500 from the swindlers, Mazurosky went to one of his banks, the United States National at Portland, and presented the cashier's check for collection with instructions "Please rush; wire fate", and with the further instruction to send the cashier's check by air mail (Tr. 119).

In October, 1935, Frank Nelson and his "partner", Mr. Londergan, victimized H. F. Belter in the country near Kennewick, Washington, with the same pretended eye operation, defrauding Mr. Belter of $800 (Tr. 54). Nelson and Londergan pretended to be Dr. Miles and J. C. Adams, respectively (Tr. 66). The appellant Joe Mazurosky almost immediately came into possession of the $500 check (Government's Exhibit 4) (Tr. 136), sending it through one of his banks, the Bank of California, N.A., Portland, Oregon (Tr. 109), where, at the personal request of Mr. Mazurosky, it was sent directly to the bank upon which it was drawn, and, contrary to usual custom, not through the Federal Reserve System. Furthermore, to show knowledge upon the part of the appellant, he requested also that a no protest stamp be affixed to this check (Tr. 110).

Subsequently, in further negotiations concerning the Belter check, it was proven that on October 20, 1935, Mazurosky again presented said check to the Bank of California, with the specific request "Please hold for a few days if necessary", and "Remit in Portland exchange". It will be recalled from the testimony of H. F. Belter, the victim, that when he was victimized he informed the swindlers that "the check would be good in a few days" (Tr. 67), from which there is no other inference but that the appellant Mazurosky was in communication with the criminals and was informed by them that the check would be good in a few days.

It is notable that about three months later, in December of 1935, the appellant received another check, the last prior endorsement of which was "J. C. Adams" (Government's Exhibit 5). This check was obtained by the same Frank Nelson, alias "Slats" from E. C. Deibert (Tr. 75). Concerning that check and concerning the prior endorser, "J. C. Adams", the appellant stated to detectives of the Portland police, W. E. Williams and O. A. Powell (Tr. 78, 80), that he had known "Adams" for about sixteen years; that he knew "Adams" as "Slats", and that "Slats" was an eye specialist bunk as far as he knew. The latter is an undenied admission by the appellant Mazurosky that he knew the details of the scheme by which the fraud he furthered was perpetrated.

POINTS AND AUTHORITIES

I.

One who with guilty knowledge joins himself, even slightly, to a criminal conspiracy is guilty as a principal.

Schwartzberg vs. United States, 241 Fed. 348.
Silkworth vs. United States, 10 Fed. (2d) 711.
Hume vs. United States, 118 Fed. 689.
Alexander vs. United States, 95 Fed. (2d) 873.
Levey et al vs. United States, 92 Fed. (2d) 688.

II.

The scheme to defraud charged in the indictment amounts to a criminal conspiracy and is not terminated until the spoils are collected.

Hartzell vs. United States, 72 Fed. (2d) 569.
Tincher vs. United States, 11 Fed. (2d) 18.
Alexander vs. United States, 95 Fed. (2d) 873.
United States vs. Kenofskey, 243 U. S. 440.

III.

Under Title 18, Section 338, it is sufficient to warrant conviction to show that the mails were, in fact, used in furtherance of the scheme to defraud, regardless of a prior intent.

Silkworth vs. United States ,10 Fed. (2d) 711.
Chew vs. United States, 9 Fed. (2d) 348.
Farmer vs. United States, 223 Fed. 903.

IV.

In prosecutions of this nature, great latitude in the introduction of testimony is allowed.

Williamson vs. United States, 207 U. S. 425.
Smith vs. United States, 267 Fed. 665.
Hartzell vs. United States, 72 Fed. (2d) 569.

V.

Evidence of guilty knowledge may be inferred from circumstances alone, and evidence to show guilty knowledge is liberally received; its admissibility rests with the sound discretion of the trial court.

Johnson vs. United States, 22 Fed (2d) 1.
Mitchell vs. United States, 229 Fed. 357.
Corbett vs. United States, 89 Fed. (2d) 124.
Ketterbach vs. United States, 202 Fed. 377.
Williamson vs. United States, 207 U. S. 425.

VI.

Where the guilt of a defendant is clearly established on the whole case, errors in the admission or exclusion of evidence must be substantial and clearly prejudicial to warrant reversal.

Smith vs. United States, 267 Fed. 665.
Williams vs. United States, 265 Fed. 625.

ARGUMENT

We will engage in a brief discussion of appellant's argument, in the order in which it is offered

in appellant's brief.

Respecting Count Four of the indictment, based upon the mailing of a draft by the First National Bank of Kennewick, Washington, to the Bank of California in Portland, Oregon, it is alleged that anyone cognizant of banking practice might foresee that the original check must find its way to the drawee bank, the first bank being the agent of the depositor; but it is alleged that the Bank of Kennewick was not the agent of the appellant when returning its draft in payment. We believe that in appellant's lengthy diversion to civil law in support of this contention, he has overlooked two important considerations, namely: (1) that the facts developed in the trial of this case showed not only that the mails were actually used by the Bank of Kennewick, but they were used as the result of the specific request of the appellant that the agencies for collection, one of which was the Kennewick bank, remit in Portland exchange; (2) the rule being that the actual use of the mails in furtherance of a scheme to defraud, without a prior intent that the mails be used, is sufficient to prove this count of the indictment, the pretense of a lack of agency is of no avail; the end being to collect the spoils as quickly as possible, both the local bank and the Kennewick were in fact agents to accomplish that end.

Further, concerning the proposal that the appellant did not know or have reason to know that the

Bank of Kennewick would send its draft through the mails, we submit that, contrary to appellant's contention, appellant did in open court, by his own admission against his interest, acknowledge the customary usage and course of business of the Bank of Kennewick and all other banks with which he was doing business. We believe, in view of the above, that the civil authorities cited by appellant are not of assistance in determining the necessary elements of the crime charged against the appellant.

Under the principles here involved, we further submit that the rules of evidence to the effect that the presumption of innocence must prevail do not apply in face of the indisputable fact that the mails were used.

Respecting appellant's contentions concerning Counts Seven and Eight, the conspiracy counts, that there is no substantial evidence to show that it was a part of the agreement that the mails be used, we respectfully urge that there was ample circumstantial evidence from which the jury could find this concededly necessary element. Some of these circumstances were as follows:

In 1933 the appellant specifically requested the United States National Bank of Portland to air mail the draft obtained by fraud from Clara Allen; he conceded knowledge of customary usage and course of business of the banks; he was a business

man of long experience; he was playing a part in a conspiracy which he could plainly see required an individual who might, with pretense of good faith, receive the swindled checks from whatever distant points the swindlers might send them and place them in legitimate banking channels for collection according to the custom and usage of banks; the checks, made out to fictitious payees and criminals, could not be cashed by them at the banks in the vicinity of their criminal operations.

Again, appellant contends that there is no substantial evidence to show that the defendant was one of the co-conspirators. We resort to the mass of undisputed and unexplained circumstances in the evidence:

A 10% and 15% commission for cashing a check cannot be said to be a legitimate commercial transaction; in each instance when the appellant played his part by placing the swindled checks in banking channels in order that the spoils might be actually obtained, he did so with special instructions to his agents, the banks, and revealed great haste to procure the proceeds; he acted so energetically in the furtherance of the scheme of his co-conspirators that he accepted each of the negotiable instruments obtained by fraud, not only without regard to the illegality of their origin, but without regard to the fictitious character of the prior endorsements, which he admittedly knew; it is shown conclusively

that he was acquainted with the conspirator, Martin, but the evidence of his acquaintance with the conspirator, Gray, is not so complete; it is evident, however, that he communicated with the conspirator, Gray, through Martin, whom he knew as Terrill, because the appellant accepted the Mershon check (Government's Exhibit 1), with Gray's fictitious signature upon it; over a period of years the appellant could have revealed the true identity of the operators of the eye doctor racket to the Portland police in response to their inquiry, but instead he continued to accept their 10% and 15%.

The unlawful conspiracy described in each of these two counts is shown by the mass of evidence of concerted action in which the appellant joined.

Appellant complains that Nelson did not testify that he had conversations with Mazurosky in such a way as to inform him, but Mazurosky admitted to police detectives in 1935 that, as far as he knew, "Slats" (Nelson) had been engaged with Dr. Brown in the eye fraud, and that he had known him for about sixteen years.

POINT I.

One who with guilty knowledge joins himself, even slightly, to a criminal conspiracy is guilty as a principal.

The foregoing statement of facts has revealed in

what manner and over what period of time the appellant joined himself with the conspirators in the field who performed the pretended eye operations. The Circuit Court of Appeals for the Second Circuit, in Schwartzberg, et al, vs. United States, supra, a mail fraud prosecution, made pointed comment to the argument on the part of one schemer or co-conspirator that his was a very small part in the wrong-doing:

> "But all who with criminal intent join themselves, even slightly, to the principal schemer are subject to the statute, although they may know nothing but their own share in the aggregate wrong-doing."

The same principle is repeated in Alexander vs. United States, supra (8th C.C.A., April 12, 1938), wherein, in this most recent mail fraud cause, the Court ruled:

> "The fact that he (one of the schemers) came in long after the plan had had its beginnings or that he did not take part in carrying out each phase of it * * * does not absolve him of complicity at the times mentioned."

In the instant case the record reveals that the appellant did, in fact, come into the scheme upon every occasion when it was necessary to collect the spoils through banking channels. It is true that, so far as the record shows, the appellant did not at any time go into the field and practice the deception practiced by his co-conspirators, Gray and Andrews

on the one hand and Nelson and Londergan on the other.

In the case of Silkworth, et al, vs. United States, 10 Fed. (2d) 711, plaintiff in error Gilbaugh was the floor broker on a stock exchange. He assisted a co-partnership member of the exchange in carrying out a bucketing scheme. He made a few suggestions as to how the fraudulent operators should conduct their scheme and gave them information necessary for their protection. He contended on appeal that he did not take part in the scheme itself. But he did have knowledge of the insolvency of the co-partnership and continued to execute their orders for bucketing thereafter. The Court commented:

> "To satisfy a jury that he was a participant of the scheme to defraud customers was an easy task under the circumstances and they found him guilty. If his intent was criminal when he joined a dishonest enterprise, he was part of the scheme. * * * All who with criminal intent join themselves, even slightly, to the principal schemer are subject to the statute, although they may know nothing but their own share of the aggregate wrong-doing."

It is submitted that this principle is often repeated by the appellate courts and that, taking the appellant Mazurosky's contentions almost as a whole, coupled, for the sake of argument only, with the admissions against his interest given to the witness, Post Office Inspector C. B. Welter, he cannot

escape being held subject to the statute.

This Honorable Court has applied the same principle in Levey vs. United States, 92 Fed. (2d) 688. Mazurosky worked with the others mentioned whenever the occasion arose. He accomplished the actual procurement of the spoils. His was a greater part than that played by Levey in the above Ninth Circuit case.

> "It is also contended that the evidence is insufficient to sustain a conviction on the conspiracy count. This contention may be briefly disposed of. Levey worked with others and defrauded investors. The jury could properly infer that Levey and the others had agreed to do so. In fact, it would do violence to the evidence to infer the contrary."

POINT II.

The scheme to defraud charged in the indictment amounts to a criminal conspiracy and is not terminated until the spoils are collected.

More recent decisions plainly assert that the scheme to defraud contemplated in the statute is analogous to a criminal conspiracy. Therefore, when applicant Mazurosky participated in the scheme practiced by Gray and Anderson and Nelson and Londergan to the extent that he played a major part in accomplishing collection of the spoils, he assumed responsibility for their fraudulent acts and furthered them in the manner stated.

In Alexander vs. United States, supra (which includes three other cases), a criminal prosecution was instituted against numerous defendants under the mail fraud statute under the theory that they had planned and consummated a scheme to defraud, using the mails, by organizing a fictitious school of chiropractics, printing and sending through the mails fictitious diplomas from the school. In that case the appellant Debeh was one of the parties who knowingly received a fictitious diploma through the mails and fraudulently pretended to practice a profession under it. It was urged on his behalf that, no matter how reprehenisble his conduct, he could not be tried for violation of Section 338, Title 18. However, the court sustained his conviction because, with knowledge of the existence of an unlawful enterprise, he aided it. The Court applied this principle:

> "Again, in determining whether Debeh was a party to the scheme charged, we may refer to the law of conspiracy for helpful analogy, since a scheme such as this, participated in by more than one individual, constitutes in fact a conspiracy."

In Tincher vs. United States, 11 Fed. (2d) 18, Tincher and others were convicted of a violation of the mail fraud statute because of a scheme devised to place a fictitious value upon an oil lease. Other parties to the scheme used the mails; Tincher made the personal contact with a victim and made certain

false representations to him. The court placed the responsibility upon all of the participants to the fraud. As to Tincher the court said:

> "In such case the mailing of the letter was in law the act of all the defendants."

In this same authority from the Fourth Circuit Court of Appeals the court foresaw appellant's contention that his was not a part of the scheme and that the Kennewick Bank was not his agent as charged in Count Four of the indictment. The rule of reason is applied:

> "The collection of the checks was a necessary part of the working out of the scheme. In fact it was through the collection of these checks that the defendants collected and divided the spoils of their fraud."

The Supreme Court of the United States was confronted with similar contentions in United States vs. Kenofskey, 243 U. S. 440. In the lower court the defendant Kenofskey successfully contended upon demurrer that the scheme of procuring a false claim to be paid by an insurance company was fully executed when he handed the false claim to a local agent of the company, who innocently mailed it to a distant point. The action reached the Supreme Court under the Criminal Appeals Act, and that Honorable Court tersely ruled:

> "We do not think the scheme ended when Kenofskey handed the proofs to his superior

officer. As said by the Assistant Attorney General, 'the most vital element in the transaction both to the insurance company and to Kenofskey remained yet to become an actuality, that is the payment and receipt of the money.' Such payment and receipt would, indeed, have executed the scheme, but they would not have served to 'trammel up the consequence' of the fraudulent use of the mails."

POINT III.

Under Title 18, Section 338, it is sufficient, to warrant conviction, to show that the mails were in fact used in furtherance of the scheme to defraud, regardless of a prior intent.

Since appellant's brief concedes the distinction between the necessity of proving intent to use the mails under Count Four of the indictment and under Counts Seven and Eight, we pass a detailed discussion of authorities cited. We submit the point is of importance in answering appellant's contention concerning the lack of evidence and lack of agency under Count Four of the indictment.

> "It is not necessary to prove that any of the plaintiffs in error, including this one, at the time they entered into the common scheme, intended to use the mails. *It is enough that the mails were used in its execution.*"
>
> Silkworth vs. United States, 10 Fed. (2d) 719.

We reiterate that the record shows a definite use of

the mails in the proof as to Count Four of the indictment.

POINT IV.

In prosecutions of this nature great latitude in the introduction of testimony is allowed.

During the course of the trial below, the appellant stated objections to the major portion of the evidence offered by the government as not binding upon or showing a connection between the appellant and the other admitted swindlers. Answers to this contention are found both in authorities under the criminal statutes now under consideration and under the general principles of circumstantial evidence.

Smith vs. United States, 267 Fed. 665, a mail fraud prosecution with conspiracy counts, is authority for the following:

> "In prosecutions of this nature great latitude in the introduction of testimony is allowed, as in most instances the offense can only be established by circumstantial evidence."

The same principle is asserted by the Supreme Court of the United States in Williamson vs. United States, supra, as applied to circumstantial evidence generally. We have conceded that a large part of the evidence in the court below against Mazurosky was circumstantial evidence. We quote from the United States Supreme Court in the above case:

> "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be."

More recently, in Hartzell vs. United States, supra, the 8th Circuit Court of Appeals, in August, 1934, referring to the mail fraud statute, at p. 584 of that opinion, stated:

> "In prosecutions of this character great latitude is allowed in the introduction of evidence of attending circumstances. * * * The evidence admissible to establish the scheme and the intent may be extensive in scope and rests largely within the jurisdiction of the trial judge."

Without repeating the circumstances in evidence here, we offer these authorities, with the contention that they warrant the reception in evidence by the trial court of all the circumstances revealed in the record.

POINT V.

> Evidence of guilty knowledge may be inferred from circumstances alone, and evidence to show guilty knowledge is liberally received; its admissibility rests within the sound discretion of the trial court.

This point is offered, in view of appellant's contention that the testimony of the so-called Wagner transaction, occurring in the year 1925, was inadmis-

sible and highly prejudicial to the appellant. We submit on principle that such evidence was admissible, not only to show knowledge, but to show the relationship of the various parties. Had the appellant been acquainted with his co-conspirator, Nelson, during boyhood, we believe that the fact would have been admissible evidence and that, if incidentally evidence of another crime was revealed, the evidence of the relationship, including that of the other crime, would, nevertheless, have been admissible.

In Johnson vs. United States, 22 Fed. (2d) 1, this Honorable Court declared, in response to the contention that evidence of another offense was wrongfully admitted and highly prejudicial,

> "It was not, in our judgment, error for the Government to bring before the jury the entire history of the defendant's connection with the matter, so it could more intelligently determine whether he did in fact receive the $2,000 referred to in the indictment, and, if so, whether he knew at the time he received it that it had been stolen from the mail."

In 1913 this Honorable Ninth Circuit Court of Appeals answered appellant's complaint with respect to the remoteness in time of the Wagner transaction, when, in Ketterbach vs. United States, 202 Fed. 377, evidence of a similar transaction occurring seven years before was admitted over the objections of the defendant. The Appellate Court stated, at p. 384:

> "No limit is placed upon the power of the court to admit evidence of a series of prior similar transactions committed by the accused. The period of time within which the matters offered to establish the guilty purpose must have occurred to permit their admission is largely discretionary with the court."

This Honorable Court further directed attention to authority holding that evidence of a similar offense committed twelve years prior to the transactions described in the indictment was admissible. This Ninth Circuit decision was also based upon Williams vs. United States, 207 U. S. 425, which we believe requires no further comment.

It is to be noted, however, that the instructions of the trial court respecting this evidence were carefully worded to properly advise the jury of the limits under which it should be considered, and that no exceptions thereto were noted by the defendant below.

VI.

> Where the guilt of a defendant is clearly established on the whole case, errors in the admission or exclusion of evidence must be substantial and clearly prejudicial to warrant reversal.

This point is made by way of conclusion. It is submitted that the great mass of circumstantial evidence, properly considered by the jury in the trial of this cause below, permitted of no other interpretation than that applied by the jury. Without conced-

ing for an instant that any of the evidence in the record was erroneously received or prejudicial, we quote the great weight of authority as expressed in Williams vs. United States, 265 Fed. 625:

> "Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical fact, when the trial as a whole and all the circumstances of the proofs are regarded. * * * It is manifest that he was not prejudiced by the admission of the testimony to which reference has been made."

In Smith vs. United States, 267 Fed., at p. 670, commenting on the Williams, case, the court stated:

> "* * * The modern law, so clearly stated by Judge Hook in Williams vs. United States, applies."

CONCLUSION

We conclude that the record of the court below reveals that the appellant had an extremely fair trial and that the evidence upon which the jury based its verdict of guilty was ample to justify such a verdict. We find it impossible to enter into a lengthy discussion of the points and authorities cited by the appellant, but submit that each is based upon an incomplete consideration of the facts in the record and

not in conflict with the rules under which appellant was fairly tried and convicted.

Respectfully submitted,

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No. 8809

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOE MAZUROSKY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

REPLY BRIEF OF APPELLANT

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SUBJECT INDEX

INDEX TO CASES CITED

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REPLY BRIEF OF APPELLANT

FOREWORD

Under the rule of this court, the reply brief may contain but 20 pages, exclusive of the appendix. This has necessitated placement in the appendix of one section of the material otherwise intended for the main body of the brief. The material referred to is found at pages 22 to 28 inclusive, of the appendix. We do not mean by such devious means to subvert the operation of the rule, but appellate courts do make some con-

cession in criminal cases where a man's life and liberty are substantially at stake. We trust the Court will indulge us in this chosen course. The material referred to is in reply to the discussion found at pages 3 to 8 inclusive of appellee's brief. It should be read in the interest of a complete understanding of certain salient portions of the record, and to correct a series of inferences drawn by the government attorneys, which we respectfully contend are not in the least warranted by the facts of the case.

Reply to Point I of Appellee's Brief

Argument of this point is found beginning at page 14 of appellee's brief. We have no quarrel with the proposition there contended for. If a party knowingly joins a conspiracy, he may not excuse himself by saying that his function in the operation of the conspiracy was but nominal. But he must join with knowledge of the conspiracy.

Reply to Point II of Appelle's Brief

The argument on this point is found beginning at page 17 of appellee's brief. It is made in response to the point presented by appellant beginning at page 28 of the appendix of this brief. By an inadvertance, the copy on this point did not get to the printer when appellant's brief was being printed. The copy was furnished counsel, however, and the argument under this point is in answer thereto.

We can add little to our affirmative presentation of this question, noted in the appendix. We urge that the Belter check was collected and the cash received before the Exhibit 11 was transmitted and that, therefore, the acts charged in Count 4 were not in furtherance of the fraudulent scheme.

Reply to Point III of Appellee's Brief

Argument on this point is found beginning at page 20 of appellee's brief. The contention is that the substantive offense under Sec. 338 of Title 18, U. S. C. A., may be committed without a prior intent.

Counsel apparently have misconceived the whole theory of the prosecution on the substantive counts of the indictment. The rule is that it need not be proven under this section that it was a part of the fraudulent scheme that the mails should be used in its execution. Proof that the mails were used is sufficient. But, to commit the offense chargeable under the sub-division of Sec. 338 upon which Count 4 is predicated, the accused must "knowingly cause to be delivered by mail" the particular item which it is claimed resulted in the prostitution of the mails. The cases cited by counsel clearly draw the distinction. In the Silkworth case, cited at page 20 of appellee's brief, it is noted that it is not necessary to prove that "*at the time the parties entered into the common scheme*" they intended to use the mails. That is the undoubted law as we pointed out at pages 44 and 45 of appellant's brief. It is nevertheless true, that while the scheme itself need not

embrace the mails, the accused in performing the act under the substantive count must "knowingly cause to be delivered by mail," the document which it is claimed perverts the facilities of the postal establishment.

Perhaps it was the failure of the prosecuting officials to observe this clear mandate of the statute which accounts for the paucity, if indeed not the total lack of any evidence, to show that the appellant knowingly caused the mailing and delivery of the draft, Exhibit 11, by the Kennewick bank, as charged in Count 4 of the indictment.

Reply to the Arguments Contained on Pages 11 and 12 of Appellee's Brief

This pertains to Count 4 of the indictment and to the discussion contained in appellant's brief beginning at page 23 and ending at page 39. Counsel summarily dismiss the whole subject by suggesting, (1) that the Bank of Kennewick used the mails at the "specific request" of the appellant and that appellant specifically requested that the remittance be made in Portland exchange, and, (2) that it need not be shown that the appellant had a "prior intent" that the mails should be used by the Bank of Kennewick in making the remittance. The point under subdivision (2) is considered beginning at page 3 of this brief, in response to the identical argument made under point III of appellee's brief, beginning at page 20 thereof. We refer now to the record itself to show that appellant did not make

a specific or any other kind of a request that the mails be used or that the remittance should be made in Portland exchange.

Counsel do not state where in the record this "specific request" was made, and after diligent search we are unable to find it. The only request made by the defendant, as shown by the record, was that a "no protest" stamp be placed "on the face of the check" (R. 109), and that the check be sent "direct" to the bank. This special request was not made when the check was subsequently sent through *for collection,* but at the time the check was deposited by defendant in his savings account. The Court will recall that the check was returned unpaid by the Kennewick bank after it had been forwarded by the Bank of California the first time. It was on this occasion that the special instructions were given by appellant and these instructions were limited to the "no protest" stamp and to the request that the check be sent "direct" to the bank. When the check was returned to the Bank of California, the defendant was notified that it had not been paid, and thereupon he accepted return of the check, and the bank charged his savings account in the sum of $500.00. (R. 110.) The appellant thereupon took the check to the collection department of the bank and sent it through for collection. Upon being sent through for collection, the check was accompanied by the triplicate form which is Government Exhibit 9. Three witnesses testified in respect to this exhibit. E. F. Munley iden-

tified Exhibit 9 as "a record of our bank concerning the Belter check"; "we call this record a collection register." (R. 107.) The witness Allen simply testified: "I have looked at 'triplicate form No. 9'." And the third witness, J. L. Bliss, simply noted that Exhibit 9 accompanied the check when it was sent through for collection, and that he made some notation in his own handwriting. (R. 116.) The witness Bliss was identified with the First National Bank of Kennewick. By reference to the original Exhibit No. 9, it will be seen that the only handwriting on the exhibit is that of the initial "J," that being the initial of the witness J. D. Bliss which was placed thereon by him as he testified.

Now we ask counsel, where in the record is it shown that appellant "specifically requested" that remittance should be made in Portland exchange? No witness from the Bank of California or from any other quarter testified that the appellant instructed that the remittance should be made in Portland exchange. The fact that the Bank of California did make this notation on the collection register, Exhibit 9, does not carry the inference that the defendant "specifically requested" that it be placed there. The term "Portland exchange" is a banking term of which the defendant had doubtless never heard. We find the same situation here as the Supreme Court found in the Malloy case, noted at pages 31 to 35 of appellant's brief.

Counsel further contend in this same connection that appellant acknowledged in open court the custom-

ary usage and course of business of the Bank of Kennewick and all other banks with which he was doing business. (App. Br. pp. 11, 12.) By this statement, counsel must have referred to the stipulation found on page 128 of the record.

It is the only admission we can find even remotely touching on counsel's conclusion. The stipulation, of course, speaks for itself. It was simply stipulated that the draft, Exhibit 11, was forwarded by the Kennewick bank to the Bank of California, and that it was the custom and practice and ordinary course of business to transmit such items as drafts by sending them through the mails. The stipulation does not recite that it was the custom and practice and ordinary course of business for the bank to remit funds collected by it by a draft drawn upon a correspondent bank. The provision of the stipulation was that the bank did forward its draft and that when it had occasion to so forward a draft, it used the United States mails as the means of forwarding such items. The Court will judicially notice that it is not the custom and practice and ordinary course of business for any bank to remit an item collected by it by means of its own draft. *Federal Reserve Bank of Richmond v. Malloy et al.,* 264 U. S. 160, 44 Sup. Ct. Rep. 296, 68 L. Ed. 617; *Jennings v. United States Fidelity and Guaranty Co.,* 294 U. S. 216, 55 Sup. Ct. Rep. 394, 79 L. Ed. 869 (1935). In the case of *Capital Grain & Feed Co. v. Fed. Res. Bank,* 3 F. (2) 614, 616 (D. C. Ga.), it was held that a statute of a state authorizing

remittance of a collected item to be made by an exchange draft, was unconstitutional and void, as being in derogation of the express terms of the order appearing upon the face of the check.

We direct attention at this point to an erroneous statement made at page 35 of appellant's brief. It is there stated that it was not shown that there was an understanding between the banks defining the terms of the remittanc. It is true, as we have shown, that the Bank of California did note a special instruction that remittance should be made by Portland exchange.

It is respectfully submitted, subject to the correction just noted, that the authorities and discussion presented at pages 26 to 36 inclusive of appellant's opening brief are controlling on this particular point, and that by reason thereof the conviction should not stand as to Count 4 of the indictment.

Intent to Use the Mails; Counts VII and VIII

At pages 12 and 13 of appellee's brief, is contained response to the argument of appellant appearing at pages 40 to 46 inclusive of appellant's brief on the proposition that there is no substantial evidence to show that it was a part of the agreement comprising the conspiracy that the U. S. mails should be used in executing it.

The argument is that because the appellant in 1933 (the record shows 1934, R. 142) instructed the U. S. National Bank of Portland to airmail a draft; because

he was a business man of long experience and because the "swindlers" sent checks to defendant from distant points to be placed through legitimate banking channels for collection, and because the checks could not be cashed at the banks in the vicinity of the criminal operation, sufficient proof of intent to use the mails is made out.

The facts as thus stated are grossly garbled. Gray testified that between 1930 and 1935 the Martin-Gray gang of conspirators had defrauded "probably a thousand" persons in execution of the eye frauds. (R. 98.) Only in two of these transactions, one out of every 500, was it shown that the mails were used. The record shows that in each instance the conspirators endeavored to obtain the money and cash the check at the particular point where the fraud was perpetrated. (R. 57, Wagner; R. 55, Belter). The Deibert check was post-dated, and, therefore, could not be cashed at the time; the conspirators in this instance did, however, go to the bank with Mr. Deibert to get the money and he didn't have it; hence the post-dated check. The conspirators likewise went with Mr. Belter to his bank to obtain the money (R. 55). The record does not show whether the conspirators attempted to cash the Mershon check at the bank on which it was drawn (R. 86). In the Allen transaction, Miss Allen did not have the money in the bank, but the conspirators accompanied her to the bank to get the money (R. 93). From the foregoing evidence we are unable to join in the conclusion that the

"checks . . . could not be cashed at the banks in the vicinity of their criminal operations." The proof shows quite to the contrary, and the only reason these particular checks were not cashed on the ground was because the parties did not have the money in the bank. In the absence of proof to the contrary, it may be assumed that the other 998 checks received by the Martin-Gray group were cashed right at the time the checks were received. The record shows such a course to have been their modus operandum.

It is again reiterated that the proof received in the case brings this case squarely and unequivocally within the rule of the Farmer and Schwartzberg cases, supra (App. Br. pp. 40 to 46 inclusive), and that there is an absence of any evidence sufficient to show that it was a part of the agreement comprising the conspiracy that the U. S. mails should be used in executing it.

Reply to Points IV and V of Appellee's Brief

Points IV and V of the brief of appellee are apparenly directed to a justification of the testimony relating to the Wagner transaction and to appellant's Brief, pages 59 to 64, inclusive.

No attempt is made to answer the arguments appearing in appellant's affirmative presentation of this subject. Instead, counsel quote a few cases, all without any reference to the facts of this case, and conclude generally that because the courts have given some discretion to the trial court, and because some latitude has

been given in the proof of conspiracies, the proof here was acceptible.

It will be observed that counsel do not make a claim for this testimony that it tended to show that appellant was a party to the conspiracy of Brown and Nelson which existed in 1925. The record clearly shows that not to have been the fact (App. Br. 59 to 64), and apparently this point is conceded. We are then confronted with the rule which has never been questioned in any court, that to be admissible in evidence the acts of a co-conspirator must be done while the conspiracy is pending and in furtherance of its object. That acts of a co-conspirator prior to the formation f the particular conspiracy charged in the indictment, may not be received in evidence; that evidence of disconnected smaller conspiracies directed to the same end as that defined in the general conspiracy charged in the indictment, will not be received, even though there may be an identity as to some of the parties in the two conspiracies. See *Terry v. U. S.*, 7 F. (2d) 28 (C. C. A. 9) and cases cited at pages 63, 64, App. Br.

The theory apparently is that though this testimony was inadmissible on the above grounds, it was admissible on others which counsel assign, to wit: To show knowledge and to show the relationship of the various parties. Such are the theories on which counsel offered this evidence at the trial (R. 53).

The evidence then must be tested on each of the grounds assigned to determine its admissibility.

The rules of evidence governing Federal Courts in criminal cases arising in the State of Oregon, are those which the local courts adopted in their usual daily practice when Oregon was admitted into the Union. *Louie Ding v. U. S.,* 247 F. 12, 15 (C. C. A. 9th); *Neal v. U. S.,* 1 F. (2d) 637 (C C. A. 8); *Coulston v. U. S.,* 51 F. (2d) 178 (C. C. A. 10). We look then to the rule as established in Oregon in 1859, as evidenced by the decisions of the Oregon Supreme Court.

Attention is directed to the case of *State v. Smith,* 55 Ore. 408, 106 Pac. 797. At page 416 of the opinion, is found the following rule:

> "It is generally conceded that where the proof tended to show that the accused party and his associate had conspired to do an unlawful act, evidence of other transactions in furtherance of the common enterprise is relevant. Elliott, Ev. No. 2939." . . . *"that in all other instances the admission of evidence of substantive offenses is the same in cases of conspiracy as in crimes committed by only one person, and in support of this deduction reference will be made to a few cases of the latter class."*

The Wagner transaction was "another offense" under the definition and since no claim is made that defendant was a party to the conspiracy in 1925, then the rules generally applying to the admissibility of other offenses, in substantive crimes, apply here.

The Rule in Oregon

The Oregon rule is exhaustively discussed by Justice Burnett in the leading case in this state, *State v. Wilson,* 113 Ore. 450, 233 Pac. 259, wherein the learned

justice reviews the early cases as well as the later ones in defining the rule. We quote from the opinion, at pp. 30, 31 of the appendix of this brief, to which reference is made.

Before applying the rules as thus enunciated, a distinction should here be noted. The testimony relating to the Wagner transaction which occurred in 1925 consisted of (a) acts performed by the conspirators Brown and Nelson out of the presence of the defendant, in connection with a conspiracy in which appellant was not a party, and (b) statements made by the witness Wagner to the appellant by which he was informed that the conspirators Brown and Nelson had defrauded Wagner. (R. 83; App. Br. pp. 9 to 13, inc.)

Since the testimony under classification (a) relates exclusively to a fraud perpetrated by Nelson and Brown, it is difficult to see how those acts can have any relevancy as to appellent. Under none of the rules permitting reception of testimony of other offenses, will a category be found into which this line of proof may be placed. The appellant may not be convicted upon testimony concerning the wickedness of others. Since he was not there, such proof cannot serve to show the "evidence of relationship" which counsel claim for it; since the appellant was not there, it cannot show the "knowledge" which counsel claim for it. For such testimony to be admissible it must be shown that the party who is on trial committed the other offense, thereby connecting the state of mind of the accused in the for-

mer offense, with that of his subsequent act. The Supreme Court, in the case of *State v. Wilson,* supra, expresses the thought in the following language (113 Ore. 450, 498):

> "No defendant ought to be deprived of his liberty by hue and cry or by the mob-yell of 'Crucify him,' but only upon an indictment constitutionally framed and proven *by evidence of criminal acts, a connection between which 'must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish.'*"

Thus, about one-third of the entire record, practically the whole of the testimony relating to the Wagner transaction, was admitted upon theories which were both obviously unsound and in flagrant violation of indisputible rules of evidence to which we have referred here and in the opening brief.

(b) The testimony given by the witness Wagner to the effect that he told the appellant of the fraud that had been perpetrated upon him is a horse of a different color. This testimony can have no relationship to the mass of the evidence concerning acts done by Nelson and Brown, unbeknown to appellant. This evidence would serve to show knowledge to the extent of the exact statements made to appellant by the witness. This particular bit of the evidence, which took up about one minute of the trial, would be admissible to show knowledge of the conspiracy which existed in 1925, and would be relevant were it not so remote in time and if it were not for the further fact that such statements referred

to another conspiracy altogether. The two phases of the proof are objectionable on entirely distinct and separate grounds, and each are prejudicial for different reasons, as we have endeavored to show.

Counsel suggest the transaction was not too remote in time to be of evidential value, and cite *Ketterback v. U. S.*, of this circuit, 202 F. 377 (Appellee's Br. p. 23), in support of this conclusion. We cited the foregoing case at page 62 of appellant's brief to clearly distinguish the facts of the instant case from those shown in that decision. In the Ketterback case there was a *series of transactions* extending back seven years—all leading from one act in an extensive chain to another, year by year, right up to the act charged in the indictment. The evidence there was of the most convincing sort and was clearly admissible. Here, however, we have a single, isolated transaction extending back ten years—*with a lapse of ten years* between the time the transaction was completed, and the time another of the checks was taken, with the further fact irrefutably appearing that the party here sought to be charged was not a party to the fraudulent conspiracy then in process.

The Rule in the Ninth Circuit

This court has heretofore condemned in strong language an attempt by prosecutors to convict an accused upon testimony of the character mentioned in the assignments. We have heretofore and in the opening brief

discussed the Terry case. (App. Br. p. 63.) We conclude this phase of the discussion by quoting from the opinion of Garrecht, C. J., in *MacLafferty v. U. S.*, 77 F. (2d) 715 (C. C. A. 9):

> "We hold that before the evidence in relation to these prescriptions other than the ones described in the indictment could be admittd in evidence it was necessary for the government to show that such other prescriptions or sales were connected with actual violations of the law. The rule to be applied in such cases is set forth in *Coulston v. United States,* (C. C. A. 10) 51 F. (2d) 178, at page 180, cited by appellee, where the court speaks as follows: 'In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. *Boyd v. United States,* 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; *Hall v. United States,* 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003; *Niederluecke v. United States,* (C. C. A. 8) 21 F. (2d) 511; *Cucchia v. United States,* (C. C. A. 5) 17 F. (2d) 86; *Smith v. United States,* (C. C. A. 9) 10 F. 787; Wigmore on Evidence, (2d Ed.) Sec. 194. Corpus Juris cites cases from forty-four American jurisdictions in support of this rule. 16 C. J. 586. There are many exceptions to the rule, the most common of which is that, if the prosecution must show a specific intent, evidence of other similar offenses may be used to establish that fact."

"The particular exceptions here under discussion are noted in *Paris v. Unoted States,* (C. C. A. 8) 260 F. 529, at page 531, where the court, after citing some of the authorities set forth above, declared: '. . . To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, *proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial,* may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. *In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible.*"

See also *Marshall v. U. S.,* 197 F. 511 (2d), digested at page 32 of the appendix of this brief. Also *Smith v. U. S.,* 10 F. (2d) 787 (C. C. A. 9th).

CONCLUSION

Since the organization of the Federal Judicial System, the United States Courts have applied the rule that before a man may be taken from his family, deprived of his liberty and be branded "felon," he must be fairly convicted upon legal evidence, and upon substantial evidence. We have attempted herein to show that the large bulk of the evidence upon which this appellant was tried, related to matters with which he was admittedly not concerned, and which were not mentioned in the indictment. The prosecuting officials

counter by stating, at page 25 of the answering brief, that even if this was error, the error was not prejudicial. If that be true, and if the government did not rely heavily upon the testimony covering the incident in 1925 to convict this appellant, then why was so much of the case devoted to it? This is not a fair, consistent or frank position for counsel to assume.

As respects the testimony relating to Count 7, counsel have not undertaken to suggest to the Court how any of it was admissible, in the face of the Kuhn and Mayola cases of this circuit, cited at pp. 66-67 of appellant's brief. The questions presented in the brief of appellant, with nominal exception, were not extended the courtesy of a passing glance.

We have contended throughout the case that the record was and is devoid of substantial evidence. A concise definition of "substantial evidence" is found in the recent pronouncement of the 10th Circuit in the following language:

> "Because there is no substantial evidence of a violation, the court should have directed a verdict of acquittal. Some evidence has been presented, but it is not substantial. The law requires more than merely 'some' evidence; it demands that the verdict be based on substantial evidence or a conviction will not be permitted to stand. In this case all the substantial evidence is as consistent with innocence as with guilt." *Towbin v. U. S.*, 93 F. (2d) (C. C. A. 10) 861, 866.

Juries are not permitted in civil cases to speculate on the negligence of a defendant. They should not be

permitted to guess at the guilt of a defendant in a criminal case. *Leslie v. U. S.*, 43 F.(2d) 288, 290 (10th).

The evidence shows that the appellant was operating a pawnshop and a second-hand store. In making loans upon articles pledged with him, he was, by the very nature of the business, taking chances upon the ownership of the articles so pledged. The police might at any time reclaim the pledged article. In recognition of this fact, the laws regulating such lines of business allow high rates of interest to be charged. So it was with the checks which the appellant would cash, not only for Nelson and his ilk, but for other of his customers. If the charge he made for this service was unconscionable, it was not more so than the rates of interest pawn brokers are customarily allowed in their business transactions. Nelson made many loans from appellant, and from the fact that they were made from time to time, it may be fairly inferred that Nelson repaid the loans when due. He might have known that Nelson was not in the clear, but aside from the incident which occurred in 1925, the record shows nothing whatsoever that would lead him to such a conclusion. Though he knew Nelson well, the latter had not only failed to tell him, but had carefully concealed the fraudulent scheme from him. Nelson testified:

"No, sir. I don't think I ever discussed it with Mazurosky";

"I don't really think we ever did discuss it";

"I don't remember having any conversation with him in that regard."

All of the frauds were perpetrated at points distant from the state of Oregon. Appellant was admittedly not sharing in the profits of the scheme. Of all the frauds perpetrated by Nelson over the eleven-year period, only two checks, both regular upon their face, were turned over to appellant. These are in addition to the Wagner check of 1925. Of the thousand frauds perpetrated by the Martin group, but two of the checks found their way to the appellant. The remark about the "suckers" was clearly in jest. The vernacular "sucker lists" are not composed only of those who have been bilked in fraudulent schemes, but include, likewise, those who are oversold in legitimate business transactions. Nelson was an admitted gambler.

The record does not show that appellant knew or had basis for knowledge of what Nelson was doing, or whether he was engaged in various lines of endeavor. There is not the basis for an inference, after casting aside the presumption of innocence which shelters every defendant in a criminal case, that appellant knew or had reason to suppose that the checks were obtained in an illegal pursuit, and particularly in the fraudulent schemes charged in the indictment. If it be stated that this begs the whole question, then so be it. It is our sincere conviction, on the merits and upon the testimony received in the case.

Respectfully submitted,

EDWIN D. HICKS,

HICKS & ADAMS.

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APPENDIX

REPLY TO MISCELLANEOUS STATEMENTS AND INFERENCES DRAWN FROM THE EVIDENCE

(*See this brief, page 1.*)

In the answering brief, counsel for appellee have not questioned the accuracy of the summary of the evidence presented in appellant's brief beginning on page 7 and concluding on page 21 thereof. Statement is made, however, that the summary is "inadequate," and pages 3 to 8 inclusive are devoted to a disclosure of the particulars which counsel apparently feel warrant this conclusion. The testimony referred to and the inferences drawn therefrom will now be examined with specific reference to the record so the Court may see wherein the truth lies.

At page 4 of the brief we find this statement:

> "To show that appellant had knowledge of the unlawful means by which the co-schemer and conspirator, Frank Nelson, alias 'Slats,' obtained checks from victims, made out to fictitious persons and readily accepted by appellant Mazurosky, though he at that time knew the true name of the prior endorsees on the swindled check which is Government Exhibit 7."

It is submitted that that is a gross misconstruction of the record. Only on one occasion, and that was way back in 1925, did the defendant learn that "Slats" Nelson was operating under an assumed name. When

Mr. Wagner identified the Dr. Pierce as the party who had defrauded him, the defendant readily recognized from a description given, that Nelson had perpetrated the fraud under the assumed name. Nelson, thereupon, gave complete and accurate descriptions of both Brown and Nelson. (R. 70, 74, 75, 69.) As to the transactions mentioned in the indictment, and shown in the record, there is no evidence showing that the defendant knew that either Nelson as the spear-head of one of the conspiracies, or Martin (R. E. Terrell), of the other, were operating under fictitious names or that any other of the co-actors were operating under assumed names.

The defendant knew Martin under the name of R. E. Terrell and by no other name. He forwarded the two checks to the defendant under the name R. E. Terrell, and the defendant, without exception addressed Martin as R. E. Terrell. (R. 95, 149, 150.) The two checks (Mershon and Allen) were endorsed in blank and were as freely negotiable as a five-dollar bill. There is no evidence in the record to show that defendant knew that the names H. J. Pierce and O. C. Stone, appearing upon the Mershon check (R. 134), or that the name H. J. Miles appearing on the Allen check (R. 135) were fictitious names, or otherwise than endorsements entirely regular. Martin (known to the defendant as Terrell) had endorsed neither of the checks, nor was it necessary that he do so. Checks endorsed in blank are commonly negotiated without further endorsement. The same situation is found in respect to the two checks

received by the defendant from Nelson in the Belter and Diebert transactions. (R. 136-137.) Both checks were endorsed in blank "J. C. Adams," and it was never disclosed to the defendant that J. C. Adams was the assumed name under which Londergan was operating. The record fails to show that the defendant was acquainted with Londergan or with any other of the conspirators aside from Nelson. Nelson specifically testified that the defendant knew him only as Frank "Slats" Nelson, and there is no confusion in the record on that point. Frank Nelson was the true name of Nelson (R. 61), and the defendant knew him by that name and no other. (R. 65, 50, 51.) As far as the defendant knew, as shown by this record, the names Stone, Adams et al. were entirely regular and nothing has been found in the record to indicate a contrary conclusion. The two checks turned over to the defendant by Nelson were endorsed in blank and freely negotiable without the requirement of an endorsement by Nelson, and Nelson had endorsed neither. It is respectfully submitted that the record fails to bear out the inference drawn by counsel in the above quotation from the answering brief.

At page 6 of appellee's brief it is stated that appellant falsely stated to the detectives that the person from whom he received the check was a doctor. The record shows that this check was sent to the appellant by Martin (known to appellant as R. E. Terrell), and the record does not show that this party was not a

doctor. And the other three parties who were practicing the eye fraud, to wit, Nelson, Brown, and Gray, all were doctors of optometry, duly registered and qualified as such. (R. 97, 62, 50.) Brown was known as Dr. Brown, and optometrists are commonly styled as doctors. Since all who were practicing the eye frauds about whom we have specific information were optometrists (doctors), the inference may be not unfairly drawn that Terrell was likewise a doctor of optometry. Counsel cannot fairly conclude from the record that Terrell was not much.

Counsel also observe at this point that the officers told the appellant that the check had been obtained in a "bunco" game. The Court will observe from the record that the appellant handled no more checks for the Martin-Gray gang of conspirators after this information was given him.

At page 8 of the brief, counsel construe the testimony of the officers Powell and Williams (R. 77 to 80) as an admission by the appellant that he knew the "details" of the fraudulent schemes. A glance at the record will rebut this conclusion. What appellant told the officers was that the party from whom he received the check was known to him as "Slats", never as J. C. Adams. Nelson at no time operated under the assumed name of J. C. Adams. It was Londergan who used this name, and it was Londergan who endorsed both of the checks as "J. C. Adams." (R. 51, 59.) It is apparent from these conversations that the appellent was iden-

tifying Nelson. What he did tell them was that Slats "was" an eye specialist (an optometrist), and that "he worked with Dr. Brown about sixteen years ago in the eye specialist bunk as far as he knew" (R. 80), all of which was true as shown by the record except that it was ten years instead of sixteen years "ago." If counsel mean by their conclusion that the defendant thereby admitted that he knew Nelson was engaged in the "eye bunk" business in 1925, then we agree with the construction. But after that, Nelson had engaged in the hotel business for about a year, had been in the penitentiary a couple of times, had done some gambling, and after all this had occurred it could not be fairly inferred that because he was perpetrating a particular kind of fraud in 1925, he was up to the same trick ten years later. The reasonable assumption would be that after serving a term in the penitentiary for this offense (Rockford, Ill., 1930 R. 62) Nelson had learned his lesson, and that the theory of retributive justice, which forms the bulwark of our penal system, had operated to cleanse him.

At page 6 of appellee's brief, counsel note an admission "against interest" in the testimony of Mr. Keller, of the Western Union, upon the inquiry made by appellant concerning certain moneys transmitted by him by telegraph in 1934 and 1935. The names of the parties to whom the money was sent were not given, and therefore, nothing can be claimed for this testimony.

At page 8 of appellee's brief, counsel note that in presenting the Belter check to the Bank of California, the bank was instructed to "please hold for few days if necessary." We have searched the record carefully and can find no place therein where such an instruction was given by appellant. The Belter check had already gone to the bank once and had been returned. Under such a circumstance it would be expected that the bank in returning the check a second time, this time for collection, would request that it be held. It is then observed that Mr. Belter had told the "swindlers" that "the check would be good in a few days," and from this it is concluded that appellant was in communication with the criminals and was informed by them that the check would be good in a few days. This is a logical conclusion, though not a necessary one as we have attempted to show. We are, however, unable to conclude from this that the appellant was thereby informed that the check had been obtained in a fraudulent scheme. There is nothing in the record to show that the appellant knew Nelson to be a swindler in the eye racket in 1935. Nelson specifically testified, not once but several times, that he had never informed the appellant of the fraudulent scheme, and the forwarding of a bank check, regular upon its face, with instructions to hold for a few days, would not impart the essential information.

The remaining conclusions and the recitation of the testimony contained in the appellee's brief, have been

covered in our affirmative presentation in appellant's opening brief. We shall not duplicate the effort here except as need shall arise in answering specific arguments contained in other portions of the brief.

The transmission of the draft, Exhibit 11, from the First National Bank of Kennewick to the Bank of California, was not an act in execution of the fraudulent scheme alleged in Count 4 of the indictment.

(*See this brief, pages 2, 3 inclusive.*)

It was held by the 3rd Circuit in *Newingham v. U. S.*, 4 Fed. (2) 490 (C. C. A. 3), that after the victim has parted with his money, the execution of the fraudulent scheme is complete, and any acts done thereafter in respect to the transaction would not be in furtherance of the scheme to defraud.

We have endeavored to show that the act of transmitting the draft, Exhibit 11, by the First National Bank of Kennewick to the Bank of California was an independent banking transaction and that such act could not in any sense be considered the act of the defendant. (pp. 23 to 39 incl., Appellant's Br.)

It is submitted that the facts appearing in this record do not come within the perview of the rule announced in *Spear v. U. S.*, 246 Fed. 250 (C. C. A. 8) and *U. S. v. Kenofskey*, 243 U. S. 440, 37 Sup. Ct. 438, 61 L. Ed. 836, which hold in effect that the transaction

is not completed upon receipt of the check; that the act of forwarding the check *for collection* by the bank is an act in furtherance of the scheme, with the bank acting as agent for the accused.

Under the facts of this record, the collection had been made and the victim had already parted with his money before the draft, Exhibit 11, was transmitted to the Bank of California. The business of collection was at an end at the time the Kennewick Bank charged the account of the drawer with the check. *Jennings et al. v. United States Fidelity and Guaranty Company,* 294 U. S. 216, 55 Sup. Ct. 394, 79 L. Ed. 869 (1935). Any subsequent acts, even though connected with the transaction in its broad outlines, would not be in furtherance of a scheme to defraud. The indictment charges that the defendant, *for the purpose of executing said scheme and artifice to defraud* did unlawfully, Knowingly, willfully and feloniously place and caused to be placed in the United States mails at Kennewick the draft mentioned in Count 4 of the indictment. It is the contention of the defendant that the proof fails to support this allegation of the indictment and that, therefore, the conviction on this count must fail.

The doctrine to which reference is made has been applied in the following cases:

McNear v. U. S., 60 F. (2) 861 (C. C. A. 10).
Stewart v. U. S., 119 F. 89, 95 (C. C. A. 8).
Barnes v. U. S., 25 F. (2) 61 (C. C. A. 8).
Lonabaugh v. U. S., 179 F. 476, 481 (C. C. A. 8).
Merrill v. U. S., 95 F. (2) 669 (C. C. A. 9).

(*See this brief, pages 12, 13.*)

"The case of *State v. O'Donnell,* 36 Ore. 222 (61 Pac. 892), is a leading case in this state on the subject in hand. It has been cited often and has never been overruled. Here follows the statement of Mr. Justice Moore, of the so-called exceptions:

" 'The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions, speaking of which Mr. Underhill, in his valuable work on Criminal Evidence (section 87) says: "These exceptions are carefully limited and guarded by the courts, and their number should not be increased." The author gives five exceptions to such rule, which may be summarized as follows: (1) If several similar criminal acts are so connected by the prisoner, with respect to time and locality, that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. . . Citing cases . . . Mr. Justice Agnew in *Shaffner v. Commonwealth,* 72 Pa. St. 60 (13 Am. Rep. 649), in commenting upon this exception, says: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish." (2) When the commission of the act charged in the indictment is practically admitted by the prisoner, who seeks to avoid criminal responsibility therefor by relying upon the lack of intent or want of guilty knowledge, evidence of the commission by him of similar independent offenses before or after that upon which he is being tried, and having no apparent connection therewith, is ad-

missible to prove such intent or knowledge, which has become the material issue for trial. . . Citing cases. . . Mr. Justice Rapallo, in *People v. Corbin,* 56 N. Y. 563 (15 Am. Rep. 427), in speaking of this exception, says: "The cases in which offenses other than those charged in the indictment may be proved, for the purpose of showing guilty knowledge or intent, are very few." (3) If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or to conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial. . . Citing cases. . . When a crime has been committed by the use of a novel means or in a particular manner, evidence of the defendant's commission of similar offenses by th use of such means or in such manner is admissible against him, as tending to prove the identity of persons from the similarity of such means, or the peculiarity of the manner adopted by him. . . Citing cases. . . (5) When a prisoner is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial. . . Citing cases. . . "

(*See page 17 of this brief.*)

Marshall v. United States, 197 Fed. 511, 117 C. C. A. 65 (2d Cir.):

"On the trial of an indictment for using the mails to defraud in conducting the business of a society named in the indictment and alleged to be a fraudulent organization, the United States Circuit Court of Appeals for the Second Circuit held that it was error to admit testimony showing that the defendant was also at the same time conducting another socity of precisely the same kind by identical methods, which society was not mentioned in the indictment. The court said:

> " 'It is urged that the testimony was admissible upon the question of intent; but it is difficult to perceive how the repetition of identical facts can have any legitimate bearing upon this question. If the evidence as to the Standard Society showed a fraudulent intent, the government's case in that regard was established; nothing more was needed. If, on the other hand, it failed to show fraudulent intent, how was the omission supplied by duplicating the testimony under a different name? A lawful act does not become unlawful because it is repeated. If an act be shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it doesn't add to its illegal character to show that it was repeated. If the contention of the government be correct, the acts of the defendant in relation to the Banker's Company constitute an offense under section 5480 and he had a right to rely upon the rule that he would not be called upon to answer accusations not found in the indictment. It is impossible to say how much of this evidence may be prejudiced the jury.' "

(*See page 17 of this brief.*)

Smith v. United States, 10 F. (2d) 787 (C. C. A. 9th):

"The effect of the admission of the testimony so complained of was to show or tend to show against the accused the commission of crimes independent of that for which he was on trial. With certain exceptions not applicable here, it is the well-settled rule that this cannot be done. *Boyd v. United States,* 12 S. Ct. 292, 142 U. S. 450, 35 L. Ed. 1077; *Newman v. United States,* (C. C. A.) 289 F. 712. In *People v. Molineux,* the court said: 'This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Carta?'

"The judgment is reversed, and the cause is remanded for a new trial."

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In the United States Circuit Court of Appeals

for the Ninth Circuit

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COMES NOW the United States of America, through Carl C. Donaugh, United States Attorney for the District of Oregon, and his Assistants, M. B. Strayer and J. Mason Dillard, and respectfully petitions the court for a rehearing. We are apprehensive that the Government, in its brief, has not discussed in sufficient detail the evidence pertaining to the two elements upon which the Court of Appeals has reversed the decision of the trial court.

The case is one which, as revealed by the record, was tried with extreme fairness under the supervision of the

trial judge. It will be noted from the record that before retiring for its deliberations the jury received studiously fair and comprehensive instructions. The motion for a directed verdict was carefully considered and denied.

The opinion of the Court of Appeals, if we interpret it correctly, is based upon two principles. The first is that with respect to Count Four of the indictment there is insufficient evidence to reveal knowledge on the part of the appellant, Mazurosky. The second is that with respect to Counts Seven and Eight of the indictment the prosecution has failed to show in the evidence an intent by the conspirators to use the United States Mail.

In support of this petition for re-hearing we respectfully submit three points for the consideration of the Court:

I

It is the opinion of the court that the prosecution has failed to show substantial evidence of knowledge. With respect to this, we ask the court to consider the evidence in greater detail.

II

There is substantial evidence of intent to use the mails as applied to Counts Seven and Eight of the indictment.

III

There is substantial evidence in the record to support

the finding of the jury with respect to each necessary element.

ARGUMENT

POINT I

Respecting knowledge, appellee directs attention to authorities submitted in its brief in this cause and submits in addition thereto a more detailed discussion of the testimony. First, we ask consideration of the Court of Appeals of the undisputed fact that the appellant was fully advised concerning the nature of the swindle engaged in by his co-conspirators, as evidenced by the testimony of the witness Wagner (Tr. p. 83) and further by the testimony of the witness, John Goltz (Tr. pp. 73, 74), in which the appellant stated to John Goltz, a police officer of the city of Portland, that he knew "them fellows." It is noted that one of "them fellows" to whom the defendant referred was O. A. Plummer. Though there is no evidence in the record on behalf of the appellant, the appellant argued that this was an innocent transaction. We think this circumstance is inconsistent with innocence. By his own admission the appellant received the check from a person (Nelson) with whom he was acquainted, seeing plainly that it was made out to a fictitious person, and upon inquiry falsely stating that he knew O. A. Plummer. Though the appellant, a business man, affixed his en-

dorsement "Joe Mazurosky" to this check and went so far as to threaten the maker thereof with action to collect the same, and having known both of the operators of the swindle, Nelson and Doctor Brown (Tr. p. 74, line 8), appellant still contends a lack of knowledge. Appellant professes to be a business man, yet he accepted a check, prior to the offenses charged herein, the last endorsement of which is "O. A. Plummer," which he knew was a fictitious name, and immediately thereafter not only an outraged victim of the fraud but a police detective of the City of Portland interviewed him with respect to the same (Tr. p. 74). The victim at that time informed the appellant in detail concerning the method by which he was swindled. Appellant therefore knew, as far back as 1925, that Nelson was engaged in defrauding victims by means of the "eye racket" and his later conversations with Nelson, in which he asked "How are the suckers, Slats?" are consistent with knowledge on his part during all of the years of his acquaintance with Nelson that Nelson was continuing in that line of business.

The first transaction which is the subject of this indictment occurred in 1934. Not only had the appellant been fully advised of the trick and swindle (Tr. p. 83), but he had been on intimate terms with Nelson, a co-swindler, as noted in the opinion of this court. But, in December of 1934, having received the fruits of the crime,

appellant was again advised that the fruits of the crime were obtained "in a bunko game." (Tr. p. 104). In addition to that, the appellant made the statement, under all of the circumstances of an interview by a police detective of the Portland Police Bureau, that the party was a doctor (Tr. p. 104, line 16).

This evidence reveals a studied attempt on the part of the appellant to conceal the identity of the party from whom he received the check. This concealment of the identity of the bunco men was an integral part of the scheme and essential to its success. It is submitted as evidence to show knowledge and concealment.

The negotiable instrument then under discussion was endorsed "H. J. Pierce," "O. C. Stone," "Joe Mazurosky" (Govt. Ex. 1). It is apparent from the record that the business man, Mazurosky, knew no "H. J. Pierce," knew no "O. C. Stone," and the fact remains that he accepted the check. Concerning that check, the appellant said he didn't know the whereabouts of the party who gave the check to him, which is further evidence of an attempt to conceal the identity of the bunco men.

Thereafter many circumstances are revealed in the evidence, undisputed, showing knowledge on the part of the appellant. Some of these are as follows:

In 1935 the appellant told one of his co-conspirators,

Nelson, that 10% commission for cashing the checks was not enough; that the checks were "getting a little hot and he would have to have more commission."

Communication between the appellant and Frank Nelson is revealed by the facts concerning the Belter check. When received by the swindler, the maker, Belter, had no funds in the bank and so informed Frank Nelson (Tr. 55). When the check was presented at the bank by the appellant, for a second time, instructions were given to hold the check for a few days, if necessary. While the evidence does not disclose by whom these instructions were given, we are entitled to infer that they were given by the appellant. This, we think, reveals that the appellant had communicated with Nelson and, having received the check back once unpaid, presented it again with assurance that it would be paid in the near future. Appellant could have obtained this information from no other source than through communication with Nelson.

Contrary to usual banking practice, the check was sent through "no protest" at the request of the appellant (Tr. p. 110). This, we think, is not consistent with a good faith business transaction, but is evidence from which the jury might infer appellant had full knowledge that the check was not supported by legal consideration and that no legal action could be taken to collect the same if it was not paid.

An additional undisputed fact concerning the Belter check is that the last endorser prior to the endorsement of the appellant is "J. C. Adams." The appellant's co-conspirator, Nelson, sent this check to him by mail under his true name of Nelson (Tr. p. 65, line 7). The same state of facts applies to the Deibert check (Govt. Ex. 26) as revealed by the testimony of Nelson (Tr. p. 60). In other words, the appellant well knew that J. C. Adams, payee of each of these checks, was a fictitious person. In addition, when interviewed by police officers seeking to identify "Adams," the payee of the Deibert check, the appellant stated that he had known him for sixteen years, but the appellant concealed the true identity of his co-conspirator, Nelson, in 1934. Again we find the appellant fulfilling his part in the scheme by concealing the identity of the bunco men.

When the appellant was interviewed by Police Detective Powell regarding the Deibert check, he informed Powell that "Adams" was an eye specialist (Tr .78), and on the same occasion he stated to Police Detective Williams (Tr. 80) that "Adams" was known to him as "Slats" and that he worked with Dr. Brown about sixteen years ago in the "eye specialist bunk." His statement that "Adams" had come into the store and asked him to cash a check was false. This evidence, we believe, is consistent with no other theory but that of guilty knowledge upon

his part that "Adams" was actually Frank Nelson and that he was engaged in the eye specialist racket at that time.

The appellant received 15% commission for cashing some of the checks (Tr. p. 90). We think that fact is not consistent with the theory that the appellant engaged in a good faith business transaction.

Further, to show knowledge on the part of Joe Mazurosky, the testimony of Herman Horack (Tr. p. 104) is offered to the effect that in December, 1934, appellant was informed by police officers of the City of Portland that the Mershon check (Govt. Ex. 1) received from "O. C. Stone," a fictitious person, was obtained in a bunco game. The appellant's statements to police officers (Tr. p. 106) concerning this check were false and concealing.

He communicated with another co-conspirator, Martin, addressing him as R. E. Terrill, and himself using the name of Morris (Tr. p. 130). He admitted to a United States Post Office Inspector that he knew the checks were obtained in some kind of a fraud (Tr. 132), and having been repeatedly informed of the nature of that fraud, both by police officers and by an outraged victim, we submit that there is evidence from which the jury might infer and find complete knowledge, sufficient to support its verdict, and all of these circumstances are inconsistent with innocence.

POINT II

Respecting the intent of the appellant and co-conspirators to use the mails, which is concededly a necessary element of proof to support the conspiracy counts of the indictment, we submit that the best evidence thereof is found in the fact that both the appellant and his co-conspirators did make direct use of the United States Mails by personally depositing letters in the United States Mails. (Tr. p. 50). Furthermore, appellant, being a business man, transacting business with three banks, certainly knew the practice of banks with respect to using the mails in the exchange of checks.

Again, in 1934, Joe Mazurosky specifically requested that the United States National Bank of Portland send one of the checks to Denver, Colorado, air mail (Tr. p. 120). As late as 1935 he told another bank to send one of the checks direct to the Kennewick, Washington, bank (Tr. p. 109). We offer these instances in connection with the accepted rule that a man intends the ordinary consequences of his act.

POINT III

We ask the consideration of the court of the following general principles as applicable to the instant case:

(1) The jurors are the judges of the weight of the tes-

timony and their verdict will not be disturbed unless it be out of reason.

Lempie vs. United States (9th Circuit), 39 Fed. (2) 19.

(2) The question of intent with which an act is done is solely one for the jury.

11 Amer. Jurisprudence 571.

(3) A conspiracy having been formed, each of the conspirators is liable for the unlawful act of one done in furtherance of it, though he is not familiar with the details of the particular unlawful act at the time it is committed.

United States vs. Sweeney, 95 Fed. 451.

United States vs. Kane, 23 Fed. 751.

(4) Possession of the fruits of a crime immediately or soon after its commission is in itself substantial evidence to support a verdict.

Wilson vs. United States, 162 U. S. 613.

Degnan vs. United States, 271 Fed. 293.

CONCLUSION

Applying the foregoing rules to the facts in this case, we believe there is ample evidence to justify the finding of the jury that the appellant had full knowledge of the method by which the various checks were obtained. But

even if he did not have complete knowledge of this method, he certainly knew that the checks had been obtained by means of a fraudulent scheme and possessing such knowledge he aided in the execution of that scheme. It is our understanding of the law that this evidence is ample to render him guilty of the crime charged.

A rehearing in this cause is respectfully and earnestly petitioned in the interest of justice.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney for
the District of Oregon.

J. MASON DILLARD,
Assistant United States Attorney,

M. B. STRAYER,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the attorneys for appelle, United States of America, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

J. MASON DILLARD,
Assistant United States Attorney.

No. 8812

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAISY S. KOHLER,

Appellant,

vs.

YEOMAN MUTUAL LIFE INSURANCE COMPANY and CLARA KOHLER,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WELLINGTON D. RANKIN and
ARTHUR P. ACHER,
both of Helena, Montana, and
H. W. PITKEN and
J. G. BOWES,
both of Des Moines, Iowa,
Attorneys for Plaintiff and Appellee.

PAUL W. SMITH and
DAVID R. SMITH,
both of Helena, Montana,
Attorneys for Defendant and Appellee,
Mrs. Clara Kohler.

T. H. MACDONALD,
of Helena, Montana,
Attorney for Defendant and Appellant,
Mrs. Daisy S. Kohler. [1*]

Be it remembered that on June 15, 1937, Findings of Fact, Conclusions of Law and Order was duly filed herein, being in the words and figures as follows, to-wit: [2]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

District Court of the United States District of Montana, Helena Division.

YEOMEN MUTUAL LIFE INSURANCE COMPANY, formerly Brotherhood of American Yeomen, a corporation, Des Moines, Iowa,

Plaintiff,

vs.

MRS. CLARA KOHLER, 3 North Main Street, Helena, Montana, and MRS. DAISY S. KOHLER, 501 O. & B. Building, Spokane, Washington,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

This suit in equity was begun by a Bill of Interpleader, duly verified, filed pursuant to the provisions of the Act of May 8, 1926, c. 273, Secs. 1-3, 44 Stat. 416; 28 U. S. C. Sec. 41 (26).

In its Bill of Interpleader the plaintiff alleges:

"That the plaintiff, the Yeomen Mutual Life Insurance Company, formerly Brotherhood of American Yeoman, is and at all times mentioned herein has been, a corporation duly incorporated, existing and doing business under the laws of the State of Iowa; that on May 1, 1932, the Brotherhood of American Yeomen was transformed from a fraternal beneficiary society to a mutual, level premium, life insurance company and the name was changed to the Yeomen Mutual Life Insurance Company, said transformation being made under the

laws of the State of Iowa, Sections 8861 to 8893 of said statutes of the State of Iowa; that said statutes provide that a fraternal beneficiary society may so transform but as to its members at the time of transformation, it shall be a con- [3] tinuation of the original corporation, Section 8882 reading:

> 'Such amendment or reincorporation shall not affect existing suits, claims or contracts.'

That by virtue of the above sections of the statute, the insurance in force prior to May 1, 1932, shall be and is governed by the Constitution and By-Laws of the Brotherhood of American Yeoman then in force on said date, to-wit: May 1, 1932; that the principal place of business of said corporation is in Des Moines, in the State of Iowa, and said company is a citizen of the State of Iowa; that the defendant, Clara Kohler, is a citizen of and resides in the State of Montana within the territorial jurisdiction of this court; that the defendant, Daisy S. Kohler, is a resident and citizen of the State of Washington.

"That the plaintiff as a fraternal beneficiary society issued a certain certificate of insurance, under the terms and conditions of which it provided for the payment of more than $500.00 as benefits to a designated beneficiary; that two adverse claimants, citizens of different states, one of whom resides within the territorial jurisdiction of this court, are claiming to be entitled to such insurance or benefits.

"That on or about the 26th day of July, 1923, the plaintiff company issued to one James Victor Kohler its certificate of insurance No. 177490 providing

for death benefits in the sum of $2,000.00, wherein Daisy S. Kohler, wife of the insured, was named beneficiary. Copy of said certificate is hereto attached, marked Exhibit "A" and made a part hereof. That on or about the 26th day of August, 1931, the insured in said certificate, to-wit: the said James Victor Kohler, requested that a change be made in the beneficiary named in said certificate and signed an application known and designated as 'Application for Change of Beneficiary' requesting that the beneficiary be changed from Daisy S. Kohler, wife, to Clara Kohler, wife, and delivered the [4] said application to plaintiff company. That the said application for Change of Beneficiary was received by this company at its home office on or about the 31st day of August, 1931, and a photostatic copy of said Application for Change of Beneficiary is hereto attached, marked Exhibit "B" and made a part hereof. That the said James Victor Kohler failed to submit his certificate of insurance with the aforesaid Application for Change of Beneficiary, but thereafter on March 5, 1932 completed a blank known and designated as 'Application for Duplicate Benefit Certificate under Section 115, By-Laws 1929, and Waiver', which is hereto attached, marked Exhibit "C" and made a part hereof, stating that said certificate was out of his possession and he was unable to secure the same. Said Section 115 of the 1929 By-Laws reads as follows:

> 'In case a benefit certificate is lost or destroyed or otherwise out of the possession or control of the member insured a new certificate

may be issued upon the filing of a sworn statement and written request by the member with the Secretary who shall thereupon issue a duplicate certificate, provided the explanation contained in the sworn statement is satisfactory to the Secretary. The Secretary will furnish on request a proper form for said request and affidavit.'

That in compliance with said request for change of beneficiary and application for duplicate certificate, the plaintiff issued a duplicate certificate of membership to the said James Victor Kohler bearing the same number 177490, which certificate provided for the payment of death benefits in the sum of $2,000.00 and in which certificate it was provided that all payments or benefits that accrue or become due by virtue of said certificate shall be payable to Clara Kohler, wife, or in accordance with the laws of this company. That the said Certificate provides among other things, the following:

'It is agreed by the member holding this certificate that the certificate, the charter or Articles of Incorporation, the By-Laws of the Association, the application for membership and the medical examination [5] signed by the applicant, with all amendments to each thereof, shall constitute the agreement between the Association and the member, and any changes, additions or amendments to said charter or Articles, of Incorporation and By-Laws of the Association enacted subsequent to the issuance of this certificate shall be binding upon the

> member and his beneficiary or beneficiaries and shall govern and control the agreement in all respects in the same manner as if such changes, additions or amendments had been made prior to and were in force at the time of the application for membership.'

That at this time the defendant, Mrs. Daisy S. Kohler, holds one certificate and Mrs. Clara Kohler holds a duplicate certificate.

"That the said insured, James Victor Kohler, died on or about the 9th day of May, 1933; that by reason of the death of the said James Victor Kohler the plaintiff has become indebted under the said certificate of insurance to such person or persons as may be entitled to be paid the proceeds of the same in accordance with the terms thereof and in accordance with the provisions of the Constitution and By-Laws of the Brotherhood of American Yeomen in force and governing.

"That at the time of the change of beneficiary as hereinbefore set forth in Paragraph III and continuing until the filing of this Bill of Interpleader, there was and there still is in full force and effect the following provisions of the Constitution and By-Laws of the plaintiff company as to certificates issued prior to May 1, 1932:

> 'Sec. 113. Should any member in good standing desire to change his beneficiary or beneficiaries, he may do so by returning his certificate to the Local Secretary of his Homestead, together with his written request endorsed

thereon for the proposed change, giving the name of the desired beneficiary or beneficiaries, together with their relation to the member. Said request shall be sent to the Secretary, and the Secretary shall endorse on said certificate said change and return said certificate to the said member.

'Sec. 114. If for any cause a beneficiary named in the certificate is barred by law from receiving the benefits provided for in said certificate or in case the member makes his spouse the beneficiary in his certificate and said member and his spouse are divorced, or legally separated by order of a court of competent jurisdiction before the death of the member, and said member makes no other disposition of the benefits, then the benefits which said [6] barred beneficiary would have taken, had he not been barred, or which the surviving spouse would have taken but for said divorce or order of separation, shall be paid to the person or persons who would have been entitled to receive the same if the beneficiary barred or divorced or spouse separated by order of court, as the case may be, had pre-deceased the insured and the insured had named no other beneficiary.

'Provided, however, that payment of the benefits to the beneficiary designated in a certificate shall relieve the association from all liability under said certificate unless prior to the date of said payment the Secretary of the Association shall have received notice in writing that

the designated beneficiary is barred by law from receiving said benefits or was divorced or legally separated from the member at the time of the death of the member.'

"That the defendant, Clara Kohler, claims to be the wife of said James Victor Kohler, deceased, and claims to be entitled to the proceeds of said benefit certificate in this company as the beneficiary named in the hereinbefore mentioned certificate of membership dated July 26, 1923, being Exhibit "A" hereto attached. That the defendant, Daisy S. Kohler, claims to be the former wife of said James Victor Kohler, deceased, and claims to be entitled to the proceeds of said insurance by reason of a legal agreement or assignment or property settlement entered into at the time James Victor Kohler and Daisy S. Kohler were divorced and now on file with the Court in Helena, Montana. In this connection, plaintiff alleges that long after the death of the insured, plaintiff learned that on February 20, 1929, a decree of divorce was duly entered in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, dissolving the marriage of said James Victor Kohler and said Daisy S. Kohler, wherein an alleged settlement agreement between the said parties is alleged to have been entered into. That on file in said cause is a purported copy of an alleged settlement agreement between said parties, providing, among other things, that said James Victor Kohler would pay the premiums on the policy of insurance

herein involved, thereafter to become due and that said Daisy S. Kohler would remain the beneficiary thereof. That Plaintiff was without [7] knowledge of the aforesaid alleged settlement agreement until long after the aforesaid certificate became due and payable; that it now appears that said James Victor Kohler, by his own acts and conduct, attempted to give said Daisy S. Kohler an absolute vested interest in the aforesaid policy of insurance and thereafter purported to designate the said Clara Kohler as his beneficiary. That at this time the defendant, Daisy S. Kohler, holds the original certificate and Clara Kohler holds a duplicate certificate; that both of said claimants insist that said policy of insurance be paid to them and have threatened to file suit against the plaintiff thereon; that plaintiff respectfully represents that it should not be obliged to incur the expense necessary to conduct litigation incident to determining the legality of the respective rights of said claimants, particularly since each claimant was given color of right by the insured himself in his lifetime without the knowledge of plaintiff.

"That the plaintiff has and claims no interest in the subject matter of the contention, to-wit: the said sum of $2,000, being the amount payable out of the proceeds of said insurance; that the plaintiff has incurred no independent liability to any of the parties hereto and does not in any respect collude with any of the defendants but is perfectly indifferent between them, being in the position of a

mere stakeholder; that the plaintiff does not ask any relief herein at the request of either of said defendants but asks relief solely of its own free will to avoid being molested and injured touching the matters herein set forth.

"That due proof of the death of said insured was received by plaintiff on the 22nd day of May, 1933, from Mrs. Daisy S. Kohler; that thereafter due proof of the death of said insured was received from Clara Kohler on the 24th day of May, 1933. That thereafter plaintiff attempted by correspondence with attorneys for the said claimants to have them determine between themselves their respective [8] rights to said certificate of insurance; that it was not until in the latter part of November, 1933, that the plaintiff was informed by said attorneys that there was no possibility of the parties interested being brought to some agreement in regard to how the proceeds should be paid, and it now appearing impossible to do so, the plaintiff files this Bill of Interpleader with reasonable diligence after having become satisfied that the rights of said claimants can only be determined by suit.

"That the plaintiff is uniformed and uncertain as to the respective rights of said defendants and cannot determine without hazard to itself to which of said defendants the money due upon and under the said certificate of insurance rightfully belongs; that the plaintiff is in doubt as to which of the said defendants is right in their respective claims and has no means of satisfactorily ascertaining what are the facts which are relied upon by said defendants

as to their valuation for the respective claims; that the plaintiff cannot pay over the money due under said certificate to either of the defendants without taking upon itself the responsibility of determining doubtful questions of law and fact and without incurring the risk of being subjected to great cost and expense in defending itself and to a multiple payment of said indebtedness if it should finally appear that plaintiff had wrongfully determined in favor of either claimant at the expense of the other and without being involved in a multiplicity of suits.

"That the plaintiff has paid the amount due under said certificate of insurance, to-wit: the sum of $2,000.00, into the registry of this court, there to abide the judgment of this court to be made and entered thereunder."

and,

Prays: [9]

"That the defendants and each of them may be ordered and decreed to interplead and settle between themselves their right or claim to the money due under such certificate of insurance.

"That the defendants and each of them be restrained by preliminary order and injunction from instituting or prosecuting any suit or proceeding in any state court or in any other Federal Court on account of said money or said certificate of insurance, or any other matters hereinabove stated, and that in due course such order and injunction may be made permanent.

"That this honorable court shall issue its process for the defendants, to-wit: Clara Kohler and Daisy

S. Kohler, directed to the marshals of the various District Courts of the United States in which the said defendants respectively reside or may be found, which process shall be returnable upon a day certain at such time as this honorable court shall determine.

"That this plaintiff may be allowed a sum for its reasonable expense and attorney's fees in connection with this action in such amount as the court may deem just and proper together with its costs.

"That the plaintiff may be released from further liability on account of said certificate of insurance.

"That the plaintiff may have such other and further relief as may be equitable in the premises."

So far as it is material here, Exhibit "A" attached to said Bill of Interpleader is as follows:

"This certificate is issued in exchange for a Form 'A' certificate whole life certificate.

Age 44 Amount $2000

The Brotherhood of
(emblem)
American Yeomen
Des Moines, Iowa [10]

This Benefit Certificate issued by The Brotherhood of American Yeomen, Witnesseth: That Archer, James Victor Kohler, of Helena, Montana, a member of Homestead No. 546 of The Brotherhood of American Yeomen located at Helena, Montana is entitled to the following benefits and privileges:

Death Benefit:

Within 90 days after the receipt of satisfactory proof of the death of the above named member, The Brotherhood of American Yeomen will pay to Daisy S. Kohler, Beneficiary changed, request attached, bearing the relationship of wife, the sum of Two Thousand Dollars.

Additional Indemnity for Accidental Death:

In the event and upon satisfactory proof that the death of the member named above was solely and proximately caused by external, bodily, accidental injury, exclusively and independently of all other causes; that such death occurred, within 90 days after such injury and before said member had attained the age of 65 years, within the time said member was paying the payments provided for on the back of this certificate, while this certificate was in full force under its original conditions and before the default of any payments, monthly or otherwise, and providing such injury was received while being transported as a passenger in a regularly licensed common carrier, operated by steam or electricity for the transportation of passengers, then The Brotherhood of American Yeomen will pay the beneficiary of said member, double the amount named above, or, Four Thousand Dollars.

DEPOSIT OF RESERVES.

The Brotherhood of American Yeomen agrees to maintain with the Insurance Commissioner of the State of Iowa, the accumulations necessary to pro-

vide the benefits promised by this certificate, such accumulations being the usual reserves computed by the American Experience Table of Mortality and four percent interest.

W. E. DANY, Secretary. GEO. N. FRINK, President.

* * * * * * *

Fraternal Beneficial Association. [11]

The Brotherhood of American Yeomen is a fraternal beneficial association, organized and existing under and by virtue of the laws of the State of Iowa, and is lawfully admitted to transact and is transacting its business in the state wherein the said member is domiciled and this certificate is delivered, and the provisions of this certificate are in conformity with the laws of the State of Iowa and with the By-Laws of The Brotherhood of American Yeomen.

Agreement.

It is agreed by the member holding this certificate that the certificate, the Charter or Articles of Incorporation, the By-Laws of the Association and the application for membership, and the medical examination, signed by the applicant, with all amendments to each thereof, shall constitute the agreement between the Association and the member; and any changes, additions or amendments to said Charter or Articles of Incorporation and By-Laws of the Association enacted subsequent to the issuance of this certificate shall be binding upon the member and his beneficiary, or beneficiaries, and shall govern and control the agreement in all respects in the

same manner as if such changes, additions or amendments had been made prior to and were in force at the time of the application for membership.

In Witness Whereof, The Brotherhood of American Yeomen has by its President, attested by its Secretary, signed and caused the corporate seal of the said Association to be affixed to this contract at the city of Des Moines, in the State of Iowa, U. S. A., this 26th day of July, A. D. 1923.

GEO. N. FRINK,
President."

Attest:
[Seal] W. E. DANY,
Secretary.

Attached to said Exhibit "A" are an "Application for Change of Beneficiary"; and, an "Application for Duplicate Benefit Certificate under Sections 115, By-Laws 1929 and Waiver" which are in words and figures as follows:

"The Brotherhood of American Yeomen.

APPLICATION FOR CHANGE OF BENEFICIARY.

To the Brotherhood of American Yeomen:

You are hereby notified that I, the undersigned, an insured member of said Association in Homestead No. 546, State of Montana, to whom was issued Benefit Certificate No. 177490, dated the 26th day of July, A. D. 1923, wherein Daisy S. Kohler was designated as beneficiary, do hereby revoke said designation of beneficiary and surrender said certificate for cancellation; and that I hereby appoint the

following named person..... as my beneficiar....., and request that you acknowledge said change. [12]

Name—Clara Kohler.

Age—32.

Amount—$2000.00.

Relationship—Wife.

Address—Helena, Mont.

JAS. V. KOHLER,
Genuine Signature of Applicant.

Signed in the presence of:
MRS. DAVID GEHRING
MRS. LEONARD M. MICHELS

State of Montana, County of Lewis & Clark, ss. On this 26th day of August A. D. 1931, before me personally appeared Jas. V. Kohler to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[Notarial Seal] (Name Unreadable]
Notary Public in and for said County and State.

My commission expires Nov. 14, 1933"

Change Acknowledged 3-11-32.

GEO. F. WALL,
Secretary.

"The Brotherhood of American Yeomen

Application for Duplicate Benefit Certificate Under Section 115 By-Laws 1929, and Waiver.

To The Brotherhood of American Yeomen,
Des Moines, Iowa.

I, James Victor Kohler, hereby advise the Brotherhood of American Yeomen of Des Moines, Iowa, that Benefit Certificate No. 177490 issued on my life, is out of my possession and control. The reason therefor is as follows: Out of Possession—Unable to Secure. I desire said Association to issue to me a Benefit Certificate marked "Duplicate" bearing the same date and number, and in the same amount as the above named Benefit Certificate.

In consideration of the issuance by the said Yeomen of the duplicate Benefit Certificate herein requested, I hereby release said Association from any and all liability of every nature and sort, either to me or any beneficiary therein named, arising under, out of or by virtue of the issuance of the said Benefit Certificate now [13] out of my possession and control.

I hereby certify that I am in good standing in Homestead No. 546, located at Helena, State of Montana.

Dated this 5 day of March 1932, at Helena, State Mont.

JAMES VICTOR KOHLER,
(Sign name in full)

Subscribed and sworn to before me by the above named James Victor Kohler this 5 day of March, A. D. 1932.

JOSEPH W. CHIVERS,
Notary Public in and for the County of Lewis & Clark, State Mont.
Commission expires Sept. 9, 1933."

By her verified answer filed herein the Defendant, Daisy S. Kohler, admits the allegations of the Bill of Interpleader herein and that plaintiff is entitled to the relief prayed for therein excepting that demanded in paragraphs 4 and 5 of the prayer wherein plaintiff prays for an allowance of attorney's fees and a release from further liability on account of the certificate of insurance described in the Bill of Interpleader and by way of defense thereto alleges that there is due, owing and unpaid on said certificate of insurance interest at the rate of eight per cent per annum from May 9, 1933, up to the time of the deposit of said amount of $2,000 in this court.

By her verified answer filed here in the Defendant, Clara Kohler, admits:

1. That the principal place of business of the plaintiff corporation is in the City of Des Moines, in the State of Iowa, and that the said plaintiff is a citizen of the State of Iowa; that the Defendant, Clara Kohler, is a citizen of and resides in the State of Montana, within the territorial jurisdiction of this court; and, that the Defendant, Daisy S.

Kohler is a citizen and resident of the State of Washington; and as to all other allegations set forth in said Bill of Interpleader "alleges that she has no knowledge or information thereof sufficient to form a belief and therefore denies the same;" [14]

2. That the plaintiff as a fraternal beneficiary society issued a certain certificate of insurance under the terms and conditions of which it provided for the payment of more than $500 as benefits to a designated beneficiary; that she "claims such insurance or benefits and that she resides within the territorial jurisdiction of this court;" and, "denies each and every other allegation set forth in" paragraph 2 of said Bill of Interpleader;

3. Admits the allegations set forth in paragraphs 3, 4, 7 and 10 of said Bill of Interpleader; alleges that as to paragraphs 5 and 9 of said Bill of Interpleader she has "no knowledge or information thereof sufficient to form a belief and therefore denies the same;"

4. As to the allegations of paragraph 6 of said Bill of Interpleader she admits that she claims to be and alleges that she is the wife of James Victor Kohler; that she claims to be entitled to the proceeds of said benefit certificate as the beneficiary in said certificate of membership, dated July 26, 1923, being Exhibit "A" to said Bill of Interpleader; that on February 20, 1929, a decree of divorce was duly given or made in the District Court of the First Judicial District of the State of Montana, in

and for the County of Lewis & Clark, dissolving the marriage of said James Victor Kohler and said Daisy S. Kohler; that she holds a duplicate certificate, and claims that said policy of insurance should be paid to her and has threatened to file suit against the plaintiff herein; and, "denies each and every other allegation set forth in said paragraph 6 of said Bill of Interpleader; and,

5. "Denies each and all allegations of said Bill of Interpleader not so specifically admitted or denied."

Further Answer and Cross Complaint of the Defendant Daisy S. Kohler.

"By way of further answer and cross complaint against the defendant Mrs. Clara Kohler" the defendant Daisy S. Kohler alleges; and defendant Clara Kohler admits: [15]

1. That for a valuable consideration plaintiff issued to James Victor Kohler its certificate of insurance No. 177490 as described in paragraph 3 of the Bill of Interpleader; and, that a true and correct copy of said certificate of insurance appears as Exhibit "A" of the Bill of Interpleader;

2. That on the date of the issuance of said certificate of insurance, to-wit: on the 26th day of July, 1923, Daisy S. Kohler was the wife of James Victor Kohler and that she continued to be the wife of said James Victor Kohler up to the 20th day of February, 1929, on which date the bonds of matrimony existing between the said James Victor

Kohler and said Daisy S. Kohler were dissolved by the decree of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark, which was and is a court of general jurisdiction and which said decree was duly given and made; and, that a true and correct copy of said decree is attached to said cross complaint, marked Exhibit "A"; and

3. That said James Victor Kohler died on the 9th day of May, 1933.

The defendant Daisy S. Kohler therein also alleges, but the defendant Clara Kohler denies:

1. That said certificate of insurance No. 177490, a copy of which is attached as Exhibit "A" to the Bill of Interpleader herein, provides "for the payment by the plaintiff to the defendant Daisy S. Kohler of the sum of $2000 in the event of the death of the said James Victor Kohler;

2. That at the time of the issuance of said certificate of insurance, to-wit: July 28, 1923, the defendant, Daisy S. Kohler was a person dependent on the said James Victor Kohler and continued to be such person dependent upon him until his death on May 9, 1933;

3. That said decree of divorce has not been revoked, modified, or changed and the same was in full force and effect at the time of the death of said James Victor Kohler; [16]

4. That at the time of said decree of divorce the parties thereto entered into a contract and agreement, a memorandum of which was made in writ-

ing, signed by the parties thereto, and approved in said decree of divorce, and filed in said cause and which agreement was in full force and effect on the ninth day of May, 1933;

5. That said agreement so approved by the court provided that the said James Victor Kohler should pay the premiums on said certificate of insurance above described and that this answering defendant should remain the beneficiary thereof. That said agreement was made in recognition of the dependence of this answering defendant on the said James Victor Kohler for support for herself and her minor children mentioned in Exhibit "A" hereof and that said agreement was made and entered into in reliance on the agreement of said James Victor Kohler that he would pay the premiums on said certificate of insurance and that this answering defendant should remain the beneficiary thereof, and without such provision said agreement would not have been made or entered into. And that said decree of divorce approved said agreement and property settlement in reliance on said provision and agreement;

6. That the certificate of insurance, of which Exhibit "A" of the Bill of Interpleader is a copy, was delivered to this answering Defendant by the said James Victor Kohler at the time of said divorce as an assurance to her that she should remain the beneficiary thereof, and is now, and ever since has been, in her possession and control;

7. That promptly after the death of said James Victor Kohler, May 9, 1933, the defendant Daisy S. Kohler made due proof of his death and of her claim to the proceeds of said certificate of insurance and filed the same with the plaintiff; all in due manner and form as required by law and the rules and by-laws of the plaintiff and that the amount deposited by the plaintiff in this court is now due and owing to the defendant Daisy S. Kohler, together with interest [17] on said sum from May 9, 1933, at the rate of eight per cent per annum and in equity and good conscience should, by the order of this court be paid to her;

8. That any claim of the said defendant, Mrs. Clara Kohler, is null, void, of no effect and without equity in this that the said James Victor Kohler by the contract and agreement aforesaid induced this answering defendant to change her position with reference to him and to waive other rights and claims that she otherwise had against him, in consideration that he, by said agreement, waived his right to change his beneficiary in said certificate of insurance and that in equity and good conscience he was estopped, and the defendant Clara Kohler should not be heard to say that he had the right to change his beneficiary in said certificate of insurance; and,

9. This answering defendant further alleges that previous to the date of the divorce aforesaid, the said Clara Kohler became enamored of the said James Victor Kohler and they together conspired

against this defendant to break up her home and to force her, by a course of cruel conduct toward this defendant by them, to apply for a decree of divorce so that said Clara Kohler and James Victor Kohler might marry, and that said Clara Kohler had full knowledge of the pendance of the said action for divorce, and was responsible therefor, and the complaint therein alleged that the said James Victor Kohler had repeatedly advised the plaintiff therein and defendant herein that his affections had been transferred to another woman and of his affection for her, and Defendant alleges that such "another woman" was the defendant Clara Kohler herein and that the said James Victor Kohler consulted the said Clara Kohler as his intended wife as to the terms of said property settlement and that she consulted and advised with the said James Victor Kohler with reference thereto, and had full knowledge of the terms thereof and consented thereto and accepted the benefits of said pursuant divorce [18] and is estopped to, and should not in equity be heard to claim that said James Victor Kohler had any right to change his beneficiary in said certificate of insurance and more particularly to name the said Clara Kohler as his beneficiary therein and is estopped to claim such fund or any part thereof.

By reply thereto the plaintiff admits the truth of the allegations contained in paragraph 1 of the cross complaint contained in the answer and cross complaint of the defendant Daisy S. Kohler; and, as to the remainder thereof states that "it has no

knowledge or information sufficient to form a belief and for that reason instituted this action, except the allegation that said answering defendant is entitled to interest which the plaintiff specifically denies."

The Decree of Divorce referred to in the answer and cross complaint of the defendant Daisy S. Kohler is in words and figures as follows, to-wit:

"This cause came on regularly to be heard in open court this 20th day of February, 1929, upon the complaint of the plaintiff, plaintiff appearing herein by her attorneys Lester H. Loble and Hugh R. Adair and the defendant appearing herein by H. Sol. Hepner, his attorney.

"The defendant herein having interposed a demurrer to the complaint, said demurrer was by the court duly and regularly overruled and the defendant was required to answer instanter, said defendant having refused to answer or plead further herein his default was duly and regularly entered; whereupon evidence was offered upon the part of the plaintiff free from objection as to its competency, relevancy and materiality from which it appears and the court so finds that the plaintiff is entitled to the relief prayed for in her complaint and that the material allegations of said complaint have been proven true.

"It appearing from the evidence that the parties hereto have effected a property settlement between themselves whereby the [19] plaintiff has by a bill of sale transferred and assigned to plaintiff an interest in his said business and property which said

transfer and settlement appears to this court to be just and equitable and that in addition thereto alimony should be granted and allowed to the plaintiff as is prayed for in said complaint, and that the defendant should be required to pay certain sums toward the support, maintenance and education of the two minor children of plaintiff and defendant.

"Now Therefore, on motion of Lester H. Loble and Hugh R. Adair, attorneys for plaintiff,

"It Is Ordered Adjudged and Decreed:

"1. That the bonds of matrimony heretofore existing between plaintiff and defendant be and the same hereby are wholly and permanently dissolved and the parties hereto freed from all the obligations thereof.

"2. That the plaintiff be and she is hereby given and awarded the exclusive custody and control of Mary Jane Kohler, the minor daughter of the parties hereto, with the right to take the child from the State of Montana.

"3. That the parties hereto have the joint custody and control of Roy Kohler, the minor son of the parties hereto.

"4. That the defendant be required to and he is hereby ordered to pay to plaintiff for the support, maintenance and education of the said Mary Jane Kohler, the sum of Thirty Dollars ($30.) per month commencing with the 20th day of February 1929 and to be paid on the 20th day of each month thereafter during the minority of said Mary Jane Kohler.

"5. That the defendant be required and he is hereby ordered to pay to the said Roy Kohler for his support, maintenance and education the sum of Fifty Dollars ($50.) per month commencing with the 20th day of February 1929 and the same to be paid on the 20th day of each month thereafter during the minority of Roy Kohler.

"6. That the defendant be required and he is hereby ordered to pay to plaintiff the sum of One Hundred and Twenty-Five Dollars [20] ($125.) per month as alimony, commencing on the 20th day of February, 1929, and each and every payment thereafter is to be made on or before the 20th of each month.

"Done in open court this 20th day of February, 1929.

(Signed) A. J. HORSKY
Judge"

Further Answer and Cross Complaint of the Defendant Clara Kohler.

By way of further answer and cross complaint against the defendant Daisy S. Kohler, the defendant Clara Kohler alleges, and the defendant Daisy S. Kohler by failure to deny admits:

1. "That on the 26th day of July 1923, the plaintiff herein for valuable consideration issued to James Victor Kohler its certain certificate of insurance number 177490 in the sum of Two Thousand Dollars ($2,000.00) wherein Daisy S. Kohler, defendant herein was beneficiary, a copy of which

said certificate marked Exhibit "A" is attached to plaintiff's Bill of Interpleader herein and by this reference said Exhibit "A" is made a part of this Answer and Cross Complaint.

2. "That on the 20th day of February, 1929, the bonds of matrimony existing between the said James Victor Kohler and the said Daisy S. Kohler were dissolved by Decree duly given or made in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, a copy of which Decree marked "Exhibit A" is hereto attached and made a part hereof.

3. "That on the 11th day of March, 1929, the said defendant Mrs. Clara Kohler and the said James Victor Kohler were united in marriage.

4. "That on the said 20th day of February, 1929, the said James Victor Kohler and the said defendant Mrs. Daisy S. Kohler entered into that certain contract for settlement and adjustment of their property rights in contemplation of said Decree of Divorce a copy of which said contract marked "Exhibit B" is hereto attached and made a part hereof.

[21]

5. "That on the 9th day of September, 1930, in the City of Helena, County of Lewis and Clark, State of Montana, in consideration of the sum of $4,000.00 represented as follows, to-wit: One Thousand Dollars ($1.000.00) in cash and which said cash the said James Victor Kohler paid to the said defendant Mrs. Daisy S. Kohler and that certain promissory note in the words and figures, to-wit:

'$3,000.00 Helena, Montana, September 9, 1930.

'For value received I promise to pay to Daisy Kohler, or order, the sum of $3,000.00 in the installments and within the times following, to-wit: The sum of $50.00 on or before the 9th day of October, 1930, and the sum of $50.00 on or before the 9th day of November, 1930, and a like sum of $50.00 on or before the 9th day of each and every month thereafter until said principal sum is fully paid, together with interest thereon at the rate of six per cent per annum from date hereof until paid, interest payable monthly on or before the 9th day of each and every month; negotiable and payable at the Union Bank & Trust Company of Helena, Montana; and the makers and endorsers hereby waive presentment, demand, protest, and notice of each and all thereof and of non-payment, and I agree to pay reasonable attorneys fees in case of suit on this note because of default in payment of principal or interest or any part thereof.'

'J. VICTOR KOHLER' "

6. "That after said settlement the said James Victor Kohler demanded of said Mrs. Daisy S. Kohler that she turn over to him said insurance certificate but the said Mrs. Daisy S. Kohler refused to turn said insurance certificate over to him.

7. "That on the 26th day of August A. D. 1931, said James Victor Kohler applied to the plaintiff,

The Brotherhood of American Yeomen to change the beneficiary on said certificate of insurance from Daisy S. Kohler to Clara Kohler but said The Brotherhood of American Yeomen notified said James Victor Kohler that it would be necessary to either produce the original certificate of insurance or to have a duplicate certificate issued and so on the 5th day of March, 1932, the said James Victor Kohler applied to said Plaintiff The Brotherhood of American Yeomen for a Duplicate Certificate of insurance a copy of which said certificate of insurance appears as Exhibit "A" of the Bill of Interpleader and by this reference said Exhibit "A" is made a part of this cross complaint." [22]

8. That the said James Victor Kohler died on May 9, 1933, in the City of Helena, County of Lewis and Clark, State of Montana, and this answering defendant (Clara Kohler) made due proof of his death and of her claim to the benefits and the proceeds of said certificate of insurance and filed the same with the plaintiff, The Brotherhood of American Yeomen, all in due manner and form and as required by law and the rules and by-laws of said plaintiff.

The defendant Clara Kohler therein also alleges, but the defendant Daisy S. Kohler denies:

1. By giving the note which the said James Victor Kohler made, executed and delivered to the defendant Daisy S. Kohler as set out in paragraph 5 of the further answer and cross complaint of the defendant Clara Kohler the said James Victor

Kohler settled in full with the defendant Daisy S. Kohler for all moneys, obligations, advantages and benefits conferred, due or which in the future would become due under and by virtue of said decree of divorce and under and by virtue of said property settlement contract and said defendant Daisy S. Kohler agreed to satisfy in full and mark paid said decree and contract of record;

2. That the sum of $2,000 deposited by plaintiff in this court is now due and owing to the defendant Clara Kohler, together with interest on said sum from May 9, 1933, at the rate of six per cent per annum and in equity and good conscience, by the order of this court, be paid to her; and,

3. That any claim of the defendant Daisy S. Kohler is null, void, of no effect and without equity in that the said defendant Daisy S. Kohler settled in full with the said James Victor Kohler.

The copy of the Decree of Divorce attached as Exhibit "A" to the Further Answer and Cross Complaint of the defendant Clara Kohler is identical with the copy of the same hereinbefore set out.

The copy of the agreement attached as Exhibit "B" to said Further Answer and Cross Complaint is in words and figures as follows, to-wit:

[23]

"This agreement made and entered into this 20th day of February, 1929 by and between J. Victor Kohler of Helena, Montana, party of the first part, and Daisy Kohler, of the same place, party of the second part, Witnesseth,

"Whereas, the parties hereto have not been congenial nor able to agree for considerable time past and each of the parties hereto are desirous of going their separate ways and dividing their joint holdings, and,

"Whereas, the second party has declared her intention of instituting a divorce proceeding with a demand for One Hundred and Twenty-Five Dollars ($125.) per month as alimony; Thirty Dollars ($30.) per month for the support, maintenance and education of Mary Jane Kohler, the minor daughter; and Fifty Dollars ($50.) per month for the support, maintenance and education of Roy Kohler, the minor son, and

"Whereas, each of the parties hereto believe that an amicable settlement and adjustment of their property rights can be effected independent of any court action but which settlement the party of the second part intends to and will submit to the court for approval.

"That for and in consideration of the sum of One Dollar ($1.00) as to the other in hand paid, the receipt whereof is acknowledged, and other good and valuable considerations, the parties hereto agree as follows:

"1. The party of the first part having this day transferred by bill of sale to the party of the second part an undivided one-half interest in and to the business at No. 3 Main Street, known as the Kohler Art Store, and the Business at No. 4 Jackson Street, known as the Kohler Mortuary, all in Helena, Mon-

tana, that the party of the first part shall have the active management and control of said businesses and shall receive as salary therefore a sum not to exceed Three Hundred Dollars ($300.00) per month; That the party [24] of the first part will conduct the said businesses in a good businesslike manner; that he will employ no more help than is necessary for the conduct of the business and shall not pay salaries to employees in excess of the usual amount paid employees in Helena for the same kind and character of work.

"2. That the parties hereto shall jointly receive the net profits of said businesses, the net profits thereof to be arrived at on or before the first day of January of each year. That from the net profits of said businesses there shall be annually deducted the sum of Fifteen Hundred Dollars ($1500), annual alimony allowed second party. That after deducting the said sum of Fifteen Hundred Dollars ($1500) from the net profits, the balance and residue over and above said sum shall be divided equally between the parties hereto. In no one (1) year shall there be deducted more than the sum of Fifteen Hundred ($1500) from said net profits as aforesaid, and the amount deducted shall be the amount of the alimony actually paid in any one year by the party of the first part to the party of the second part.

"3. That the party of the first part shall furnish quarterly statements of the conditions of said businesses to the party of the second part; that the party

of the second part shall have at all times have the right to inspect said businesses, its books and affairs but shall not interfere with the actual management of said businesses unless the party of the first part should fail to pay the alimony due the party of the second part or unless he shall fail to carry out the terms and provisions of this agreement or shall fail to conform to the decree of divorce and each and every provision thereof. If the party of the first part should fail to carry out the terms of this agreement or should fail to conform to the decree of divorce, then the party of the second part may enter upon said business premises and take over and assume the management of said businesses to the exclusion of the party of the first part until said party of the first part shall have complied with the terms of this agreement and the decree of divorce. [25]

"4. The party of the first part being by the decree of divorce required to pay Roy Kohler the sum of Fifty Dollars ($50.) per month until said Roy Kohler becomes twenty-one years of age, it is understood that said sum of Fifty Dollars ($50.) per month shall be charged against the whole of said businesses.

"5. That the party of the first part agrees to transfer to the party of the second part on this date a second mortgage of H. V. Hagler for the purchase of the premises known as 614 Third Street, Helena, Montana, said second mortgage and the notes evidenced thereby being in the sum of Thirty-Five Hundred Dollars ($3500).

"6. That the party of the first part agrees to transfer to the party of the second part by all his right, title and interest in and to the money due or to become due from Basil Mason for the purchase of 609 Third Street, Helena, Montana, said transaction being evidenced by notes and deeds in escrow and being in the sum of Seven Hundred Eighty Dollars ($780). By the transfer of the Hagler and Mason obligations to the party of the second part, she shall become the absolute owner thereof.

"7. That the party of the first part shall pay to the party of the second part all of her expenses from Helena, Montana to Norwalk, Connecticut, where the party of the second part is going to visit her daughter, Clarice. That the party of the first part agrees to at any time thereafter pay all the expenses of the party of the second part to any point that she may desire to go from Norwalk for the purpose of making her home.

"8. That the party of the first part agrees that on or before September 1st, 1929 he will purchase an automobile for the party of the second part of her selection, at the point where she then lives and that the same shall cost not less than Seven Hundred and Fifty Dollars ($750), one-half of the cost of said automobile shall be paid out of the businesses of the parties hereto, the remaining one-half shall be paid individually by the party of the first part. [26] The Buick automobile now in the possession of the party of the first part shall be his own individual property.

"9. That party of the first part agrees immediately upon being advised by the party of the second part of her permanent residence to send to her by freight prepaid all of her personal effects including a piano, pictures, radio, books, lamps and dishes.

"10. That party of the first part agrees that he will pay the premium on a certain policy of life insurance in the sum Two Thousand Dollars ($2000) in which the party of the second part is beneficiary and she shall remain the beneficiary, said policy of insurance being known as a Yeomen Beneficiary certificate.

In Witness Whereof, the parties hereto have hereunto set their hands in duplicate this 20th day of February 1929."

The Case Came On For Trial before the court sitting without a jury at Helena, Montana. The plaintiff was represented by Messrs. Wellington D. Rankin and Arthur P. Acher, its attorneys. The defendant Clara Kohler was present in court in person and represented by Messrs. Paul W. Smith and David R. Smith, her attorneys; and the defendant Daisy S. Kohler was present in court in person and represented by Mr. T. H. MacDonald, her attorney.

Messrs. S. C. Ford, E. G. Toomey and C. A. Spaulding, all of Helena, Montana and members of the bar of this court, called as witnesses for the plaintiff were duly sworn and examined and each of them stated that in his opinion the services rendered by the attorneys for the plaintiff in the case

at bar were reasonably worth the sum of $250.

Daisy S. Kohler, called as a witness on her own behalf was sworn and testified. While this witness was on the stand "defendant Daisy S. Kohler's Exhibit 2", a copy of a letter said to have been sent by the defendant Clara Kohler to James Victor Kohler, now deceased, on January 17, 1929, (R. pp. 14-15); "Exhibit 3 for Clara Kohler", a letter said to have been addressed by one P. G. Schroeder [27] to the defendant Daisy S. Kohler under date of March 7, 1931, in which, among other things, the writer stated: "I was in Mr. Kohler's store yesterday and he asked about a life insurance policy which I believe he said was with The American Yeomen, and he said he would like to have this policy returned to him. I do not seem to remember very much about this matter in connection with your original deal with him. Would you mind writing at your convenience and telling me how this matter stands." (R. p. 19); "Exhibit 5 for Clara Kohler", said to be a copy of a letter written by the defendant Daisy S. Kohler to said P. G. Schroeder, under date of March 10, 1931, in reply to the letter identified as "exhibit 3 for Clara Kohler", in which the writer says: "In regard to the insurance policy that Mr. Kohler would like returned to him. I do not feel that it is necessary to make any reply for Mr. Kohler—but, to you, for your own personal knowledge I will be glad to tell you that Judge Smith has the original contract, and it states that the policy had been given to me, and that Mr. K. was to keep

up the payment on it. * * * I helped equally with him to pay for the policy for 30 yrs. and for my childrens rights, as well as mine, I do not see that it is right for me to give it to Miss Hardie. She no doubt will outlive us both, and I believe the children should have the benefits, and that just brings a question to my mind. Would my children benefit by the policy if I were to die before Mr. K. I suppose if I refuse to give him the policy he will stop the payments. I would be glad to have your advice in this matter, wish I were near enough to talk it over with you * * *" (R. p. 21): "Exhibit 6 for Clara Kohler" a letter addressed by P. G. Schroeder to the defendant Daisy S. Kohler under date of March 24, 1931, in which he says: "I talked with Judge Smith about the life insurance policy and he brings up several points which may be of interest. For one thing we all know that with an assessment company, the insured can very quickly lose all rights under the [28] policy and have it declared void by non-payment of the stated assessment. Then the matter of the terms and conditions as outlined in the policy. With a fraternal policy it would probably be found references made to the constitution and by laws, so before any one can really learn very much about what can or what can not be done, it is necessary to read all of these things. Judge Smith suggests that under some conditions he has known of a fraternal body, whatever its name is, entirely refuse to pay a loss on a policy when the beneficiary of record is no longer living at the time of the death

of the insured. He says further that he doubts whether this company would pay a loss to you now that the insured has another wife. The policy probably emphasises the fact that the next of kin would be recognized and you being removed from this situation, there is grave doubt in his mind whether you would ever realize anything from the policy. The suggestion, therefore, is that you read all these documents carefully and see what light may be thrown on the subject." (R. pp. 21-22); "Exhibit 4 for Clara Kohler", a letter addressed to P. G. Schroeder by the defendant Daisy S. Kohler under date of April 7, 1931, in which she says: "Your letter regarding the insurance, followed me over to Pullman, where I was supplying for two weeks, and back here, so that I have only had it a few days. The Yeomen lodge here, advise me to write to the home office, and give them certain information which I do not possess so I am relying on your generosity again to ask if you will find out for me, in what public record our agreement, at time of divorce, is recorded. The lodge here seem to think, in as much as Mr. Kohler mentioned giving me the Yeomen policy, and saying he would keep it up for me, in his agreement might make it valid. They suggest that I know just where this agreement is recorded, number of page etc. so that I can give this information to the head office when I write. I believe Judge Smith has this agreement too—if you cared to look at it. Would it not be a good idea to ask Mr. [29] Berry, living over the auditorium,

who is sec'y for the Yeomen there, if Mr. K. has kept up his payments or perhaps you know this from Mr. Kohler himself. In my reply to your letter before, perhaps I was a little rude in my reply to be given Mr. Kohler. I really do not want to be any thing but kind to him, but I remember at the moment I read your letter, I felt that he was trying to take the little I had away from me, and I was bitter for the moment, but now I realize he cannot take any eternal good from me, and that is all that counts, so if you think I should give him an answer, you may say I am thinking it over." (R. pp. 22-23); and, "Exhibit 7 for Daisy S. Kohler", a letter addressed "by The Brotherhood of American Yeomen, by Geo. F. Wall, Secretary" to the defendant Daisy S. Kohler, under date of April 30, 1931, in which the writer says: "We have referred your letter of April 21st to our General Counsel, Mr. H. W. Pitkin. He suggested that we advise you that we are now attempting to secure a change in the laws regarding the payment of the benefits of a certificate to a divorced spouse. In his opinion, this change will probably be made in the laws within the next two years and his suggestion is that you allow the beneficiary to stand on this certificate as it now is as under the new law, which we are trying to have passed, a divorced husband or wife may secure the benefits of a certificate." (R. pp. 26-27); and, "Exhibit 8 for plaintiff", a letter addressed to Nuzum and Nuzum, Attorneys-at-Law, Columbia Building, Spokane, Washington, then

representing the defendant Daisy S. Kohler, by the "Assistant to the General Counsel" of the plaintiff herein, under date of November 17, 1933, in which the writer says: "Last summer we wrote you a letter stating that we were ready and willing to pay the sum due, to-wit: $2,000.00 if it could be decided who was the proper beneficiary so that the company might be relieved of all responsibility. We stated to you at that time that Attorney Paul W. Smith, Penwell Block, Helena, Montana represented Mrs. Clara Kohler. We have been waiting since that date for some reply as to whether the parties interested could come to some agreement in regard [30] to how the proceeds would be paid. We will wait a few days longer and unless we hear from you, we will file a bill of interpleader under the Federal Interpleader statute and let the court determine the proper party to whom the benefits should be paid. We are also writing the attorney at Helena again." (R. p. 28), were offered and received in evidence.

Clara Kohler, called as a witness on her own behalf, was sworn and testified (R. pp. 29 etc.). During the course of her examination

"EXHIBIT 9 FOR DAISY S. KOHLER

was offered and received in evidence. This exhibit is in words and figures as follows:

"Know All Men By These Presents, That I Daisy Kohler, of the City of Helena, County of Lewis and Clark, State of Montana, the party of the first part

for and in consideration of one dollar ($1.00) lawful money to me in hand paid by J. Victor Kohler of the said City of Helena, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents, grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-half interest of, in and to the goods, wares, merchandise, fixtures, accounts and good will of the Kohler Art Store, and an undivided one-half interest of, in and to the goods, wares, merchandise, fixtures, accounts, and good will of the Kohler Mortuary, being all my interest in and to said Kohler Art Store Located at No. 3 North Main Street in said City of Helena and Kohler Mortuary located at No. 4 Jackson Street, in said City of Helena, and all property pertaining thereto, subject to all existing liabilities against said business and each thereof the said party of the second part accepting this bill of sale assumes and agrees to pay all of said liabilities and agrees to save the said party of the first part harmless of and free from the payment of the same or any part thereof, the party of the first part never having participated in contracting any of said liabilities and never having assumed any responsibility thereof.

"To Have and to Hold the same, to the said party of the second part, his executors, administrators and assigns forever.

"In Witness Whereof I have hereunto set me hand and seal the ninth day of September, 1930.

[Seal] (Signed) DAISY KOHLER."

Among other things this witness testified that the plaintiff herein was at all times willing and ready to pay the money involved in this suit but did not know who was entitled to it. (R. p. 35, lines 26-30)

P. G. Schroeder, called as a witness on behalf of the defendant Clara Kohler was sworn and testified. He stated among other things, that he "recalled being in a conversation with Daisy S. Kohler, J. [31] Victor Kohler and Clara Kohler during the months of August and September, 1930" (R. p. 36, lines 30-32); the object of the meeting was for the purpose of accomplishing, if possible, a settlement of the differences existing between J. Victor Kohler and Daisy S. Kohler relating to the alimony property settlement or agreement entered into between J. Victor Kohler and the defendant Daisy S. Kohler at the time of their divorce (R. p. 37). This witness said: "Daisy Kohler, came to my office and explained that she was having great difficulty in securing payments under this alimony agreement and asked for my suggestions as to what might be accomplished to secure her payments under this contract from J. Victor Kohler. This resulted in conferences between Mrs. Daisy S. Kohler and J. Victor Kohler. These conferences were sometimes held in the office of J. Miller Smith and sometimes at Brady's office. He was a public accountant. Brady was called in to make an audit of Kohler's business affairs. The object of this was to determine whether or not it was possible to get Mr. Kohler to meet some of these conditions in the ali-

mony agreement. The financial statement made by Mr. Brady indicated that Mr. Kohler's affairs were not in good condition at all and it seemed almost useless to expect him to comply with the terms of this agreement. I suppose a half dozen or more meetings were held and it finally resulted in an offer and acceptance by Mr. Kohler of a settlement of $4,000—$1,000 of that to be in cash. A note was given for the balance of the $3,000." (R. p. 37 line 20, p. 38 line 7). "So far as I recall I never heard the question of the life insurance policy mentioned but once and at that time Daisy Kohler told me that she had in her possession this life insurance policy, explaining that it was a fraternal concern and she asked me if she should not keep it. I suggested that perhaps the policy was of very little value, for two or three reasons—one was that Mr. Kohler could discontinue the premium payments and the other that Mr. Kohler's own life expectancy might be twenty or thirty [32] years, and also that the fraternal association might not last as long as he lived. So I suggested to her that she drop the insurance matter and say nothing more about it. That is the only time I ever heard the matter mentioned at all. They, themselves, might have talked it over at times, but I heard of it only once, just as I said." (R. p. 38, lines 15-29) This witness further testified that a cashier's check for $1,000, payable to the order of the defendant Daisy S. Kohler, was handed to him by J. Victor Kohler, now deceased, along with the note for $3,000. In that connection he

said "I have no knowledge of whose money it was. It was a cashier's check issued by the Union Bank, so it did not indicate whose money it was, or from what source it came." (R. pp. 38, line 29 to p. 39, line 7) Concerning the defendant Clara Kohler this witness said: "I seldom, if ever, talked with Clara Kohler. She was always in the back ground. All negotiations were with J. Victor Kohler."

Concerning the payment of this $1,000 the defendant Clara Kohler testified that she saw the defendant Daisy S. Kohler in Kohler's Art Store on Main Street, in Helena, Montana, about September 9, 1930; that the defendant Daisy S. Kohler and J. Victor Kohler, now deceased, then had a conversation in her presence about the "Yeomen insurance policy." "They were trying to make some kind of agreement or settlement at the time and Mr. Kohler asked her to give up the policy and she agreed to do it if we would pay her $1,000 in cash;" that the $1,000 was paid with money of the defendant Clara Kohler. In that connection this witness said: "I paid the $1,000 because I felt that we would get the policy back and we would have some protection. Mr. Kohler was not well at the time. The business was not good at that time." Clara Kohler also testified that the premiums on the insurance policy were paid by her from her own funds from September 9, 1930, up to the time of the death of J. Victor Kohler. When asked "Why did you make the payments" she replied "Because the business was in a bad condition and I had a little money of

my own and I used it for the payments." (R. pp. 29-30). [33] This testimony stands entirely uncontradicted on the record. The witness P. G. Schroeder also testified that "Exhibit 3 for Clara Kohler" was a letter written by him to the defendant Daisy S. Kohler relative to the insurance policy involved in this case "at the request of Mr. Kohler": that "Exhibit 6 for Clara Kohler" is a copy of a letter which he also wrote to the defendant Daisy S. Kohler about the insurance (R. p. 34 lines 23-33). Referring to the agreement between J. Victor Kohler, now deceased, and the defendant Daisy S. Kohler, this witness testified that "Mr. Kohler acknowledged an indebtedness of $4,000. He said he could not pay the $4,000 in cash, but he could pay $1,000 in cash, and he said 'I can give you and will give you a note for $3,000 payable on the monthly instalment plan' ". Also that the debt of $4,000 "was intended to be a settlement of all these matters described by and agreement known as an alimony agreement" and when questioned by the court stated that it was his understanding that "It was in settlement of the alimony agreed on." When asked: "When, definitely was this agreement for the settlement of the alimony matters entered into" this witness replied: "The note is dated September 9 and the check which Mr. Kohler gave was delivered on the 17th, so it would be safe to say that the matter was finally settled and closed on the 17th of September." (R. p. 40, lines 1-22).

The witness P. G. Schroeder also testified that "Exhibit 9", a "Bill of Sale from Daisy S. Kohler

of an undivided one half interest in the mercantile business" was delivered at the time of the delivery of the cashier's check for $1,000 and the J. Victor Kohler note for $3,000—as "part of the same transaction." That the final agreement as to the particular sum of money to be paid to the defendant Daisy S. Kohler was made in Judge Smith's office, "and he then went to Mr. Kohler's store and repeated this proposal that he pay $4,000, having in mind also that the sum of money must be within Mr. Kohler's ability to pay, and it was thought under the [34] circumstances that Mr. Kohler never could pay any obligation greater than this $4,000. Mr. Kohler accepted that proposal when I went up to his store and told him about it." (R. p. 41, lines 6-30) When asked—do you know exactly what this agreement was this witness answered: "Well as near as any one; it apparently was not reduced to writing, at least not to my knowledge. My understanding of the negotiations and conversations was that owing to the fact that the alimony agreement was so burdensome and could not possibly be complied with, this agreement was to supercede that whole agreement, and this was to be a new one." (R. p. 41, Line 32, p. 32, Line 6)

Specific reference to the bill of sale from the defendant Daisy S. Kohler to J. Victor Kohler, now deceased, this witness said: "It was part of the general settlement; it was subsequent to the negotiations. Mrs. Kohler deeded this one half interest in the mercantile business to Mr. Kohler and Mr.

Kohler in turn paid by note and check in the sum of $4,000—$1,000 in cash and note for $3,000. The main object in making this bill of sale and in getting Mr. Kohler to accept it was so that she might be relieved of any further financial responsibility in the event of bankruptcy—if that makes it clear."

At the close of oral testimony the court directed that the application of J. Victor Kohler, now deceased, for the beneficiary certificate involved in this suit, the medical examination of the insured, the constitution and by-laws of the plaintiff company, and any amendments thereto, be delivered to the court by plaintiff's counsel with the certificate of the secretary under the seal of the plaintiff here to the effect that they are the by-laws and constitution in force at the time of the issuance of the first policy, at the time of the issuance of the second policy and at the time of the death of the deceased Kohler and also that plaintiff's counsel furnish the court with a certified copy of the laws of Iowa with reference to fraternal benefit associations in force at the time of [35] the issuance of the original policy involved in this suit and in force at the time of the issuance of the second policy issued to the deceased Kohler. These matters properly certified were filed by plaintiff's counsel in this suit.

Statutory Law of Iowa relating to fraternal benefit associations.

From the certified statutes so furnished it appears and the court so finds that at the time the

plaintiff company issued to James Victor Kohler, now deceased, its certificate No. 177490, providing for death benefits in the sum of $2000 it was and at all times since then it has been provided by statute in Iowa as follows:

1. A fraternal benefit association is hereby declared to be a corporation, society, or voluntary association formed or organized and carried on for the sole benefit of its members and their beneficiary and not for profit and having a lodge system, with ritualistic form of work and representative form of government. C. (97, Sec. 1822; S. 13, Sec. 1822; C. '24, '27, '31, Sec. 8777;

2. Such association shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident or old age, provided the period of life at which payment of physical disability on account of old age commence shall not be under seventy years, subject to compliance by members with its constitution and by-laws. C. '97, Sec. 1822; S. 13, Sec. 1822, C. '24, '27, '31, Sec. 8778;

3. Such associations shall be governed by this chapter, and shall be exempt from the provisions of the statute of this state relating to life insurance companies, except as hereinafter provided. C. '97, Sec. 1825; C. '24, '27, '31, '35, Sec. 8791;

4. No contract between a member and his beneficiaries that the beneficiary or any person for him

shall pay such members assessments and dues, or either of them, shall deprive the member of the [36] right to change the name of the beneficiary. C. '97, Sec. 1834; C. '24, '27, '31, and '35, Sec. 8792;

5. All such associations shall upon the issuance or renewal of any beneficiary's certificate attached to such certificate or endorsed thereon a true copy of any application or representation of the member which by the terms of such certificate are made a part thereof. C. '97, Sec. 1826; C. '24, '27, '31, and '35; Sec. 8793;

6. The omission so to do shall not render the certificate invalid, but if any such association neglects to comply with the requirements of Section 8793: it shall not plead or prove the falsity of such certificate or representation or any part thereof in any action upon such certificate, and the plaintiff in any such action, in order to recover against such association, shall not be required to either plead or prove such application or representation. C. '97, Sec. 1826, C. '24, '27, '31 and '35; Sec. 8794;

7. Such association may be sued in any county in which is kept the principal place of business, or in which the beneficiary contract was made, or in which the death of the member occurred; but actions to recover old age, sick or accident benefits may, at the option of the beneficiary, by brought in the county of his residence. C. '97, Sec. 1827, C. '24, '27, '31, and '35, Sec. 8795;

8. No fraternal organization created or organized under the provisions of this chapter shall

issue any certificate of membership to any person under the age of fifteen years, or over the age of sixty-five years, or unless the beneficiary under such certificate shall be the wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, step-children, child by legal adoption, legal representative, or to a person or persons dependent upon the member; provided that societies whose membership is confined to members of any one religious denomination may be permitted to provide that [37] benefits under their certificates of membership may be paid to educational, religious or charitable or benevolent institutions. C. '97, Sec. 1824, C. '24, '27, '31, and '35, Sec. 8785;

9. If after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the governing body or board of the society to make such institution his beneficiary. C. '24, '27, '31 and '35, Sec. 8786;

10. Within the above restrictions each member shall have the right to designate his beneficiary and from time to time to have the same changed in accordance with the laws, rules and regulations of the society. 38 G. A. Ch. 240, approved April 16, 1919, C. '24, '27, '31, '35, Sec. 8787;

11. No beneficiary shall have or obtain any vested interest in said benefit until the same has become due and payable upon the death of said member. 38 G. A. Chp. 240, approved April 16, 1919, c. '24, '27, '31 and '35, Sec. 8788;

12. Any society may, by its laws, limit the scope of beneficiaries within the above classes, 38 G. A. Ch. 240, approved April 16, 1919, C. '24, '27, '31, '35, Sec. 8789.

Statutory Law in Montana relating to fraternal benefit associations.

The court also finds:

First. That at all times since April 1, 1911, it was and now is provided by statute in Montana as follows, to-wit:

"Fraternal benefit societies defined. Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provisions for the payment of benefits in accordance with section 6309, is hereby declared to be a fraternal benefit society." (Sec. 1, ch. 140, laws 1911, Sec. 6305, R. C. M. 1921 and 1935.)

2. "Lodge system defined. Any society having a supreme governing or legislative body and subordinate lodges or [38] branches by whatever name known, into which members shall be elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold

regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system." (Sec. 2, Ch. 140, laws 1911, Sec. 6306, R. C. M. 1921 and 1935.)

3. "Representative form of government defined. Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; and provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates shall be held as often as once in four years. The members, officers, representatives, or delegates, or delegates of a fraternal benefit society shall not vote by proxy." (Sec. 3, Ch. 140, laws 1911, Sec. 6307, R. C. M., 1921 and 1935)

4. "Benefits. Every society transacting business under this act shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the re-

sult of disease, accident, or old age; provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years, and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent, per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustments." (Sec. 5, Ch. 140, laws 1911, Sec. 6309, R. C. M. 1921 and 1935) [39]

5. "Certificate. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution, and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions, or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution, or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership." (Sec. 8, Ch. 140, Laws 1911, sec. 6313, R. C. M. 1921 and 1935)

Second. That at all times from April 1, 1911, down to July 1, 1929, the law of Montana relating to the classes of persons to whom death benefits might be paid was as follows, to-wit:

"Beneficiaries. The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, ascending or descending, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules, or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes." (Sec. 6, Ch. 140, laws 1911, Sec. 6311, R. C. M. 1921.)

Third. That by an act approved March 8, 1929, effective July 1, 1929 (Sec. 90, R. C. M. 1921 and 1935) Sec. 6311 of the Revised Codes of Montana, 1921, just quoted, was amended by inserting therein the words "parents by legal adoption" immediately after the "children by legal adoption". (Sec. 1, Ch. 84, laws 1929)

Fourth. That by an act approved March 20, 1931, effective [40] July 1, 1931 (Sec. 90, R. C. M. 1921 and 1935) said Sec. 6311 of the Revised Codes of Montana, 1921, amended as aforesaid, was further amended by adding the words "to a person or persons upon whom the member is dependent or to the member's estate if neither wife, husband, child or parent be living, and in any event to a trustee or trust company" immediately after the words "children by legal adoption" appearing in said Section 6311, amended as aforesaid.

Fifth. That at all times on and after April 1, 1911, it has been provided by statute in Montana as follows, to-wit:

> "Certificate. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions, or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, con-

stitution, or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership." (Sec. 8, Ch. 140, Laws 1911; Sec. 6313, R. C. M., 1921 and 1935.)

The court further finds that *is* appears from the copies of the Constitution and By-Laws of The Brotherhood of American Yeomen and amendments to each thereof, certified as required by Law, Sec. 6313, R. C. M., 1921 and 1935, as follows, to-wit:

First. That at all times on and after September 1, 1921, except as hereinafter noted, the articles of incorporation of The Brotherhood of American Yeomen provided, among other things, as follows, to-wit:

1. "We, the undersigned, hereby associate ourselves, our successors and assigns into a body corporate pursuant to the provisions of Chapter 9, Title IX, of the 1897 Code of Iowa, and the [41] amendments thereto, assuming all the powers and privileges now conferred, or which may hereafter be conferred upon such corporations under the laws of the State of Iowa, and do hereby adopt the following articles of incorporation." (Constitution and By-Laws effective September 1, 1921; Edition of

January 1, 1924, Edition of January 1, 1926; Edition of January 1, 1928; Edition of June 12, 1929; and, Edition of January 14, 1932);

2. "The name of the association shall be the Brotherhood of American Yeomen;" Article I id;

3. "Its principal place of business shall be at Des Moines, Iowa; and, this association may transact business in the United States and the Dominion of Canada;" (Article II id.)

4. "The purpose of said association shall be to unite in a fraternal association all acceptable white persons between the ages of sixteen and sixty years, at nearest birthday, (changed to between the ages of fifteen and sixty-five June 13, 1925); (Article III id.)

5. "It shall have a lodge system and a ritualistic form of work, and the affairs of the association shall be conducted for the sole benefit of its members and their beneficiaries, as provided by the laws of the state in which the association shall conduct business, and not for profit, and to that end it shall provide for and pay to its members or their beneficiaries, death and disability benefits; * * * (amended effective June 13, 1925, by striking out the words 'by the laws of the state in which the association shall conduct business' and inserting in lieu thereof the words 'by the laws of the State of Iowa'.)" (Article III id.)

6. "This association shall have a representative form of government. * * *." (Article IV id.)

Second. That at all times on and after September 1, 1921, except as herein noted, the By-Laws of

The Brotherhood of American Yeomen provided, among other things, as follows, to-wit: [42]

1. The Object of this association shall be the mutual uplifting of the members of the association, the practice of fraternal love, and to bestow substantial benefits upon him and his beneficiaries as may be permitted by the laws of the state wherein this association shall operate, * * *. Sec. 3, By-Laws effective September 1, 1921; November 15, 1923; June 13, 1925; January 1, 1928; June 12, 1929; and, January 14, 1932.

2. The Liability of this association for the payment of benefits upon its certificates, for the social or other privileges of membership, shall not begin until all the acts, qualifications and requirements prescribed for the applicant in these By-Laws shall have been fully complied with by him, nor until all acts required of the local examiner and the homestead officers shall have been fully complied with, nor until his application shall have been approved by the Medical Director and a benefit certificate issued thereon and personally delivered to applicant while in good health. A strict compliance with each and all of the details above referred to shall be a condition precedent to the validity of each and every benefit certificate issued by this association. Sec. 144, By-Laws effective September 1, 1921; November 15, 1923; Sec. 105 of By-Laws effective June 13, 1925; Sec. 101 of By-Laws effective January 1, 1928; amended effective June 12, 1929, carried into By-Laws effective January 14, 1932, to read as follows:

"The liability of this association for social or other privileges or membership shall not begin until the applicant shall have made all the required payments, nor until his application shall have been approved by the Medical Director and a benefit certificate issued thereon and personally delivered to the applicant while in good health. A strict compliance with each and all of the details above referred to shall be a condition precedent to the validity of each and every benefit certificate issued by this association." Sec. 102 By-Laws effective June 12, 1929 and Sec. 102, By-Laws effective January 14, 1932. [43]

3. No Waiver Permitted. No officer of this association or any person or persons whomsoever is authorized or permitted to waive any of the provisions of these By-Laws, and such officers and persons are hereby prohibited from waiving any provisions of these By-Laws. Sec. 146, By-Laws effective September 1, 1921; By-Laws effective January 1, 1924, amended as Sec. 107 of By-Laws effective June 13, 1925, to read as follows:

No homestead, nor any of its officers or members, nor any local medical examiner or person engaged in soliciting applications for membership, shall have the power or authority to waive any of the provisions of the constitution and by-laws of this association, and the constitution and by-laws, with all changes, additions and amendments to each thereof hereafter enacted, shall bind each member and his beneficiaries, and copies of the constitution and by-

laws with all changes, additions and amendments to each thereof or any of them certified by the Secretary of the Association, shall be received and accepted as prima facie proof of the terms and conditions thereof.

Said Sec. 107 of the By-Laws effective June 13, 1925, was carried into the by-laws effective January 1, 1928, as Sec. 103, into the By-Laws effective June 12, 1929 and January 14, 1932 as Sec. 104.

4. That Sec. 159 of the By-Laws of the Brotherhood of American Yeomen, effective September 1, 1921, is in words and figures as follows, to-wit:

"Should any member in good standing desire to change his beneficiary or beneficiaries, he may do so by returning his certificate to the Correspondent of his Homestead, together with his written request endorsed thereon for the proposed change, giving the name of the desired beneficiary or beneficiaries, together with their relation to the member. Said request shall be accompanied by a fee of fifty cents, and the Secretary shall endorse on said certificate said change and return said certificate [44] to the said member. In case the beneficiary member makes his spouse the beneficiary in his certificate and said member and his spouse are divorced or legally separated by order of a court of competent jurisdiction before the death of the member, and said member makes no change in his beneficiary as named in the certificate, the benefits under said certificate shall be paid to the legal heirs of such deceased member. If for any cause the beneficiary

named in the certificate is barred by law from receiving the benefits provided for in said certificate, the legal heirs of the deceased member shall become the beneficiaries, and the benefits provided for in said certificate shall be paid to such legal heirs."

5. That said Sec. 159 was amended effective June 13, 1925, to read as follows, to-wit:

"Should any member in good standing desire to change his beneficiary or beneficiaries, he may do so by returning his certificate to the Correspondent of his Homestead, together with his written request endorsed thereon for the proposed change, giving the name of the desired beneficiary or beneficiaries, together with their relation to the member. Said request shall be sent to the Secretary, accompanied by a fee of fifty cents, and the Secretary shall endorse on said certificate said change and return said certificate to the said member.

"If for any cause a beneficiary named in the certificate is barred by law from receiving the benefits provided for in said certificate or in case the member makes his spouse the beneficiary in his certificate and said member and his spouse are divorced, or legally separated by order of a court of competent jurisdiction before the death of the member, and said member makes no other disposition of the benefits, then the benefits which said barred beneficiary would have taken had he not been barred, or which the surviving spouse would have taken but for said divorce or order of separation, shall be paid to the person or persons who would have [45] been

entitled to receive the same if the beneficiary barred or divorced or separated spouse, as the case may be, had pre-deceased the insured and the insured had named no other beneficiary." Sec. 123, By-Laws effective June 13, 1925;

6. That said section of the By-Laws of The Brotherhood of American Yeomen as so amended was carried into the By-Laws thereof effective January 1, 1928, as Sec. 112;

7. That said Sec. 159 of the By-Laws of The Brotherhood of American Yeomen effective September 1, 1921, amended as aforesaid, was again amended and carried into the By-Laws of said association effective June 12, 1929 and January 14, 1932 as Secs. 113 and 114, which are in words and figures as follows, to-wit:

"Should any member in good standing desire to change his beneficiary or beneficiaries, he may do so by returning his certificate to the Local Secretary of his Homestead, together with his written request endorsed thereon for the proposed change, giving the name of the desired beneficiary or beneficiaries, together with their relation to the member. Said request shall be sent to the Secretary, and the Secretary shall endorse on said certificate said change and return said certificate to the said member."

"If for any cause a beneficiary named in the certificate is barred by law from receiving the benefits provided for in said certificate or in case the member makes his spouse the beneficiary in his certificate and said member and his spouse are divorced,

or legally separated by order of a court of competent jurisdiction before the death of the member, and said member makes no other disposition of the benefits, then the benefits which said barred beneficiary would have taken, had he not been barred, or which the surviving spouse would have taken but for said divorce or order of separation, shall be paid to the person or persons who would have been entitled to receive the same if the beneficiary barred or divorced or spouse separated by order of court, as the case may [46] be, had pre-deceased the insured and the insured had named no other beneficiary.

"Provided, however, that payment of the benefits to the beneficiary designated in a certificate shall relieve the Association from all liability under said certificate unless prior to the date of said payment the Secretary of the Association shall have received notice in writing that the designated beneficiary is barred by law from receiving said benefits or was divorced or legally separated from the member at the time of the death of the member."

8. Lost Certificate. That Sec. 160 of the By-Laws of The Brotherhood of American Yeomen, effective September 1, 1921, is in words and figures as follows, to-wit:

"In case a benefit certificate is lost or destroyed or otherwise out of the possession or control of the member insured, a new certificate may be issued upon the filing of a sworn statement by the member with the Correspondent of his Homestead, accom-

panied by a fee of 50 cents, which statement and fee shall be forwarded under seal of the Homestead to the Secretary, who shall thereupon issue a new certificate; provided, that the explanation contained in the sworn statement is satisfactory to the Secretary."

That said Section was carried into the By-Laws of said Association, effective November 15, 1923, as Sec. 160, and, effective June 13, 1925 as Sec. 124.;

That said Section so carried into said By-Laws effective in 1923 and 1925, as aforesaid, was amended, effective January 1, 1928, to read as follows, to-wit:

"In case a benefit certificate is lost or destroyed or otherwise out of the possession or control of the member insured, a new certificate may be issued upon the filing of a sworn statement by the member with the Correspondent of his Homestead, which statement shall be forwarded under seal of the Homestead to the Secretary who shall thereupon issue a new certificate; provided, that the [47] explanation contained in the sworn statement is satisfactory to the Secretary." (By-Laws 1928, Sec. 113.)

That said Section 113, effective January 1, 1928, as aforesaid, was amended effective June 12, 1929, to read as follows, to-wit:

"In case a benefit certificate is lost or destroyed or otherwise out of the possession or control of the member insured a new certificate may be issued upon the filing of a sworn statement and written request by the member with the Secretary who shall

thereupon issue a duplicate certificate, provided the explanation contained in the sworn statement is satisfactory to the Secretary. The Secretary will furnish on request a proper form for said request and affidavit." (By-Laws of 1929, Sec. 115.)

That said Section 115 of the By-Laws of 1929 was carried into the By-Laws of the Brotherhood of American Yeomen, effective January 14, 1932, as Section 115 thereof and the same has been continued in force from said last mentioned date.

The Court further finds the fact to be as follows, to-wit:

1. That at the time the Bill of Interpleader was filed herein on January 19, 1934, two adverse claimants, Mrs. Clara Kohler of Helena, Montana and Mrs. Daisy S. Kohler of Spokane, Washington, citizens of different states, were claiming to be entitled to the money admittedly due and owing from the plaintiff herein to either one or the other of them under and pursuant to the terms and conditions of its certificate of insurance No. 177490, providing for death benefits in the sum of $2,000, wherein Daisy S. Kohler, then the wife of James V. Kohler, the insured, was named as beneficiary; or, its duplicate certificate of membership bearing the same number issued by it to the said James V. Kohler after his divorce from the defendant Mrs. Daisy S. Kohler, which provided for the payment of death benefits in the sum of $2,000 to the defendant Clara Kohler, then and at all times thereafter to the time

of the death of said James V. Kohler, on May 9, 1933, the wife of said James V. Kohler. [48]

2. That at the time said Bill of Interpleader was filed as aforesaid the plaintiff herein neither had nor claimed any interest in the subject matter of said contention between the defendants Mrs. Daisy S. Kohler and Mrs. Clara Kohler, to-wit: The right to receive said sum of $2,000; had incurred no independent liability to either of the parties defendant herein; did not in any respect collude with either of said defendants, but was perfectly indifferent between them; being in the position of a mere stakeholder;

3. That at the time said Bill of Interpleader was filed as aforesaid the plaintiff was uninformed and uncertain as to the respective rights of said defendants and could not then determine without hazard to itself to which of said defendants the money due upon said certificate of insurance No. 177490 or said duplicate certificate bearing the same number rightfully belonged and was then in doubt as to which of said defendants was right in her respective claim; had no means of satisfactorily ascertaining what facts were relied upon by either of said defendants in support of her claim of right; could not then pay over the money due upon said certificate of insurance No. 177490 or said duplicate certificate bearing the same number without taking upon itself the responsibility of determining doubtful questions of law and fact and incurring the risk of being subjected to great cost and expense in defending

itself and to a multiple payment of said indebtedness if it should finally appear that plaintiff had wrongfully determined in favor of either of said defendants and claimants at the expense of the other and without being involved in a multiplicity of suits;

4. That plaintiff has not at any time asked any relief herein at the request of either of said defendants but asks relief solely of its own free will to avoid being molested and injured touching the matters set forth in said Bill of Interpleader;

5. That prior to the filing of said Bill of Interpleader herein the plaintiff here attempted by correspondence with attorneys for [49] the said defendants and claimants to have them determine between themselves their respective rights to said $2,000; that it was not until the latter part of November, 1933, that plaintiff was informed by said attorneys that there was no possibiliy of the parties interested, the parties defendant here, being brought to some agreement in regard to how said money should be paid, and it then appearing impossible for them to do so the plaintiff filed its Bill of Interpleader herein with reasonable diligence after having become satisfied that the rights of said defendants and claimants could only be determined by suit;

6. That at the time said Bill of Interpleader was filed herein as aforesaid, the plaintiff here paid the amount due under said certificate of insurance No. 177490 or said duplicate certificate of membership

bearing the same number, to-wit: the sum of $2,000 into the registry of this court, and to abide the judgment of the court;

7. That $150 is a reasonable attorney's fee to be allowed to the plaintiff in this case;

8. That on February 20, 1929, the bond of matrimony then existing between the said James Victor Kohler and the said Mrs. Daisy S. Kohler was dissolved by a decree of divorce duly given, made and entered of record in the district court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark;

9. That the defendant Mrs. Daisy S. Kohler was never dependent upon said James Victor Kohler at any time after the dissolution of said bond of matrimony as aforesaid;

10. That on February 20, 1929, said James Victor Kohler and the defendant Mrs. Daisy S. Kohler entered into a certain contract in writing for the settlement and adjustment of their property rights in contemplation of said decree of divorce, a copy of which is attached to the answer and cross complaint of the defendant Mrs. Clara Kohler, filed herein on March 30, 1934; [50]

11. That insofar as it is material at this point, said contract is in words and figures as follows, to-wit: "10. That party of the first part (James Victor Kohler, interpolated), agrees that he will pay the premium on a certain policy of life insurance in the sum of Two Thousand Dollars ($2,000) in which the party of the second part (the defendant Mrs.

Daisy S. Kohler, interpolated), is beneficiary and she shall remain the beneficiary, said policy of insurance being known as a Yeomen Beneficiary Certificate;"

12. That on March 11, 1929, the said James Victor Kohler and the defendant Mrs. Clara Kohler were united in marriage and at all times thereafter up to the time of the death of said James Victor Kohler on May 9, 1933, were husband and wife;

13. That on September 9, 1930, in the City of Helena, County of Lewis & Clark, State of Montana, in consideration of the sum of $4,000 represented as follows, to-wit: One Thousand Dollars ($1,000) to be and which was paid to the defendant Mrs. Daisy S. Kohler in cash and the execution and delivery by said James Victor Kohler of a certain promissory note to the defendant Mrs. Daisy S. Kohler and which he did thereafter and pursuant to said agreement execute and deliver to her, the same being in words and figures as follows, to-wit:

"$3,000.00 Helena, Montana,
September 9, 1930.

For value received I promise to pay to Daisy Kohler, or order, the sum of $3,000.00 in the installments and within the times following, to-wit: The sum of $50.00 on or before the 9th day of October, 1930, the sum of $50.00 on or before the 9th day of November, 1930, and a like sum of $50.00 on or before the 9th day of each and every month thereafter until said principal

sum is fully paid, together with interest thereon at the rate of six per cent per annum from date hereof until paid, interest payable monthly on or before the 9th day of each and every month; negotiable and payable at the Union Bank & Trust Company of Helena, Montana; and the makers and endorsers hereby waive presentment, demand, protest, and notice of each and all thereof and of non-payment, and I agree to pay reasonable attorneys fees in case of suit on this note because of default in payment of principal or interest or any part thereof."

"J. VICTOR KOHLER." [51]

The said James Victor Kohler paid and settled in full with the defendant Mrs. Daisy S. Kohler for all moneys, obligations, advantages and benefits conferred or intended to be conferred and then due and owing or which in the future would become due or owing under or by virtue of said decree of divorce and under or by virtue of said property settlement contract between said James Victor Kohler and the defendant Mrs. Daisy S. Kohler and the latter then and there promised and agreed to accept and receive the same in full settlement for all moneys, obligations, advantages and benefits conferred or intended to be conferred and then due and owing or which in the future would become due or owing to her under or by virtue of said decree of divorce or by virtue of said property settlement contract between said James Victor Kohler and the defendant

Mrs. Daisy S. Kohler and the latter then and there promised and agreed to satisfy in full and mark said decree and contract paid of record;

14. That at the same time and place and as a part of the same transaction the defendant Mrs. Daisy S. Kohler subscribed, acknowledged and delivered to said James Victor Kohler a certain instrument in writing, Exhibit "9" for Daisy S. Kohler, wherein and whereby, for value received, she granted, bargained, sold and conveyed unto the said James Victor Kohler and his executors, administrators and assigns an undivided one-half interest of, in and to the goods, wares, merchandise, and fixtures, accounts and good will of the Kohler Art Store, located at 3 North Main Street in the City of Helena, Montana, and an undivided one-half interest of, in and to the goods, wares, merchandise and fixtures, accounts and good will of the Kohler Mortuary, located at No. 4 Jackson Street in said city, and all property pertaining thereto subject to all existing liabilities against said businesses and each thereof, and the said James Victor Kohler by accepting said bill of sale assumed and agreed to pay all of said liabilities and agreed to save the defendant Mrs. Daisy S. Kohler from payment of the same or any part thereof; [52]

15. That immediately before subscribing, acknowledging and delivering said instrument in writing to said James Victor Kohler, as aforesaid, the defendant Mrs. Daisy S. Kohler caused an audit of his business affairs to be made by a public accountant for the purpose of determining whether

it was possible for him to meet the conditions of said decree of divorce and said alimony agreement between him and the defendant Mrs. Daisy S. Kohler; that the financial statement made by said public accountant indicated that Mr. Kohler's business was not in a good condition, in the words of the defendant Mrs. Daisy S. Kohler "The business was doing nothing—it was gone", and that he would not be able to continue to comply with the terms of said decree of divorce and said alimony agreement; that upon being informed of these facts the defendant Mrs. Daisy S. Kohler subscribed, acknowledged and delivered said instrument in writing to said James Victor Kohler for the purpose and with the intent on her part of getting out of the businesses referred to in said instrument in writing so that she would not be liable for one-half of the debts thereof; and that "the main object in making this bill of sale and in getting Mr. Kohler to accept it was so that she (the defendant Mrs. Daisy S. Kohler, interpolated) might be relieved of any further financial responsibility in the event of bankruptcy", as stated by the witness P. G. Schroeder;

16. That at the time said agreement was entered into by and between said James Victor Kohler and the defendant Mrs. Daisy S. Kohler on September 9, 1930, as aforesaid, it was understood and agreed by and between them that it "was to take the place of the agreement that was entered into * * * at the time of the divorce", as stated by the defendant Mrs. Daisy S. Kohler while testifying herein as a witness on her own behalf; and that the

payment of said $1,000 in cash and the subscribing and delivery of said note for $3,000, paid subscribed and delivered, as aforesaid, was intended [53] to be in full settlement and satisfaction of all of the matters described in the agreement "known as the alimony agreement" made and entered into by said James Victor Kohler and the defendant Mrs. Daisy S. Kohler on February 20, 1929, a copy of which is attached, as Exhibit "B", to the Separate Answer and Cross Complaint of the defendant Mrs. Clara Kohler filed herein on March 30, 1934, as stated by the witness P. G. Schroeder;

17. That at the time the said $1,000 was paid to the defendant Mrs. Daisy S. Kohler, as aforesaid, said James Victor Kohler was wholly unable to make said payment from his own funds, all of which was then well known to and understood by the defendant Mrs. Daisy S. Kohler;

18. That before said $1,000 was paid in cash to the defendant Mrs. Daisy S. Kohler, as aforesaid, it was understood and agreed by and between her and James Victor Kohler that upon the payment of said $1,000 in cash and the execution and delivery of the note mentioned and referred to in Finding Number Thirteen (13) above (page 43), she would give up and deliver to said James Victor Kohler said beneficiary certificate No. 177490 and renounce and give up any right or claim of right which she then had or claimed to have to, under or by virtue of the benefit certificate involved in this suit, and would make no claim thereon, thereunder or because thereof, all of which was then made known to and

understood by the defendant Mrs. Clara Kohler by said James Victor Kohler and the defendant Mrs. Daisy S. Kohler, with the intent in each of them that the defendant Mrs. Clara Kohler, acting in reliance thereon and in the belief that the defendant Mrs. Daisy S. Kohler would carry out her part of said agreement, would advance the $1,000 which was agreed to be paid and which was paid by said James Victor Kohler to the defendant Mrs. Daisy S. Kohler in cash, as aforesaid;

19. That at the time it was understood and agreed by and between the defendant Mrs. Daisy S. Kohler and James Victor Kohler that [54] upon the payment of said $1,000 in cash and the execution and delivery of the note mentioned and referred to in finding No. 13 above (page 43), she would give up and deliver to said James Victor Kohler said beneficiary certificate No. 177490 and renounce and give up any right or claim of right which she then had or claimed to have to, under or by virtue of the benefit certificate involved in this suit and would make no claim thereon, thereunder or because thereof and made the same known to the defendant Mrs. Clara Kohler, said promises were made by the defendant Mrs. Daisy S. Kohler without any intention of performing them or either or any of them and with the intent in her to deceive the defendant Mrs. Clara Kohler and with the intent and in the expectation that as a result of being so deceived by the defendant Mrs. Daisy S. Kohler the defendant Mrs. Clara Kohler would furnish to said James Victor Kohler, from her own funds, the $1,000 which

was agreed to be paid and which was actually paid in cash by said James Victor Kohler to the defendant Mrs. Daisy S. Kohler.

20. That said $1,000 so paid in cash as aforesaid was paid with the money of the defendant Mrs. Clara Kohler furnished by her to said James Victor Kohler for that purpose as a result of and in reliance upon said last mentioned agreement by and between said James Victor Kohler and the defendant Mrs. Daisy S. Kohler and in the belief that upon the payment of the same and the execution and delivery of said promissory note by said James Victor Kohler to the defendant Mrs. Daisy S. Kohler, as aforesaid, the latter would receive and accept the same in full settlement for all moneys, obligations, advantages and benefits conferred or intended to be conferred and then due and owing or which in the future would become due or owing to her under or by virtue of the decree of divorce and the property settlement contract between said James Victor Kohler and the defendant Mrs. Daisy S. Kohler hereinbefore more particularly mentioned and referred to and satisfy in full and mark said decree and contract paid of record; renounce and give up all right or claim of right which she then had or claimed to have to, under or by virtue [55] of the benefit certificate involved in this suit; and, would make no claim thereon, thereunder or because thereof;

21. That had it not been for her understanding of and reliance upon said agreement by and between said James Victor Kohler and the defendant Mrs.

Daisy S. Kohler, and the performance by the defendant Mrs. Daisy S. Kohler of her part of said agreement as aforesaid, the defendant Mrs. Clara Kohler would not have advanced said $1,000 from her own funds to be used for the purpose aforesaid;

22. That the defendant Mrs. Daisy S. Kohler failed, refused and neglected to carry out her part of said agreement so entered into by and between said James Victor Kohler and the defendant Mrs. Daisy S. Kohler on September 9, 1930, as aforesaid; and did not give up or deliver to said James Victor Kohler said beneficiary certificate No. 177,490 or renounce or give up any right or claim of right which she may then have had or claimed to have to, under or by virtue of the benefit certificate involved in this suit, notwithstanding the fact that said James Victor Kohler made demand upon her that she do so; but, on the other hand she, the defendant Mrs. Daisy S. Kohler, did make claim thereon, thereunder and because thereof thereafter and prior to the filing of the Bill of Interpleader herein as aforesaid, and at all times during the progress of this suit, and failed, refused and negelected to satisfy in full and mark said decree and contract paid of record;

23. That at no time after said $1,000 was paid to the defendant Mrs. Daisy S. Kohler in cash and said note was executed and delivered to her by said James Victor Kohler, as aforesaid, was the defendant Mrs. Daisy S. Kohler dependent in any degree upon said James Victor Kohler for support, maintenance or assistance;

24. That at no time after said $1,000 was paid to the defendant Mrs. Daisy S. Kohler in cash and said note was executed and delivered to her by said James Victor Kohler, as aforesaid, was there any obligation on his part, either moral, legal, or equitable, in any degree to support, maintain or assist her; [56]

25. That after September 9, 1930, the premiums on the benefit certificate involved in this suit were paid by the defendant Mrs. Clara Kohler with her own money; and,

26. The Court further finds the facts in issue in this suit generally in favor of the defendant Mrs. Clara Kohler and against the defendant Mrs. Daisy S. Kohler.

CONCLUSIONS OF LAW.

On the facts so found as aforesaid the Court concludes the law to be as follows, to-wit:

1. That the plaintiff herein has fully complied with the statute in such cases made and provided and should be discharged from further liability to the defendants Mrs. Clara Kohler and Mrs. Daisy S. Kohler, or either of them, based on, growing out of or arising from the issuance by it of its *of its* said certificate of insurance No. 177490, providing for death benefits in the sum of $2,000, wherein the defendant Mrs. Daisy S. Kohler, then the wife of James Victor Kohler, the insured, and now deceased, was named as beneficiary; or, its duplicate certificate of membership bearing the same number issued by it to the said James Victor Kohler, after

his divorce from the defendant Mrs. Daisy S. Kohler, which provided for the payment of death benefits in the sum of $2,000 to the defendant Mrs. Clara Kohler, then and at all times thereafter to the time of the death of said James Victor Kohler, on May 9, 1933, the wife of said James Victor Kohler; and that the said defendants and each of them should be enjoined permanently from instituting or prosecuting any suit or proceeding in any state court or in any other federal court on said certificate of insurance No. 177490 and said duplicate certificate of membership bearing the same number so issued by the plaintiff herein as aforesaid, or either of them. Act of May 8, 1926, c. 273, Secs. 1-3, 44 Stat. 416; subdivision (26) of Sec. 41, Title 28, U. S. C.;

2. That as at the time the Bill of Interpleader was filed herein on January 19, 1934, the plaintiff herein was charged merely with the duty of holding the money involved in this suit and paying it [57] over to the proper person, and plaintiff having paid said money into the registry of the court, there to abide the judgment of the court; and neither fault, bad faith nor unreasonable delay on its part having been shown, it is not justly chargeable with interest. 33 C. J. p. 202, Sec. 58; Peterson v. Chorley, ... Cal. App. ....., 284 Pac. 956, 957; Grover v. Sentell, C. C. A. 5th C., 66 Fed. 179, 181;

3. That the plaintiff herein should be allowed and paid its costs and disbursements herein necessarily expended, including a reasonable attorney's fee hereby fixed at the sum of $150 out of the money paid by it into the registry of the court, there to

abide the judgment of the court. Mass. Mut. Life Insurance Co. v. Morris, et al., C. C. A. 9th C., 61 Fed. 2d. 104, and cases there cited; Act of May 8, 1926, c. 273, Sec. 1-3, 44 Stat. 416; subdivision (26) of Sec. 41, Title 28, U. S. C.; Mutual Life Insurance Co. v. Bondurant, C. C. A. 6th C., 27 Fed. 2d. 464, 465-6;

4. That in addition to the fees for other services rendered in this suit in equity, the Clerk of this court shall charge, collect and deduct therefrom one per centum of $2,000 deposited by the plaintiff herein in the registry of the court, there to abide the judgment of the court, pursuant to statute,—the Acts of February 22, 1917, c. 113, 39 Stat. 929; February 25, 1925, c. 317, Secs. 1-3, 43 Stat. 976; and, May 8, 1926, c. 273, Secs. 1-3, 44 Stat. 416, Subdivision (26) and Sec. 44, Title 28, U. S. C., as amended, for receiving, keeping and paying out said money pursuant to said statute and by order of this court. R. S. Sec. 828, from act of Feb. 26, 1850, c. 80, Sec. 1, 10 Stat. 163, 167; sub-division 8 of Sec. 555, Title 28, U. S. C. Mutual Life Insurance Co., et al. v. Phelps, Clerk of District Court, C. C. A. 6th C., 27 Fed. 2d. 464, 466(5); McGovern, et al. v. U. S. C. C. A. 7th C., 272 Fed. 262; U. S. v. Payne, et al. District Court, W. D. Washington, N. D., Neterer, 30 Fed. 2d. 960, 961-'2; Miss. Mills Co. v. Cohn, 150 U. S. 202, 204-'7; [58]

5. That at the time the plaintiff herein issued to James Victor Kohler, now deceased, its certificate of insurance No. 177490, providing for death benefits in the sum of $2,000, wherein the defend-

ant Mrs. Daisy S. Kohler, then the wife of said James Victor Kohler, the insured, was named as beneficiary and at all times thereafter, for the purposes of this suit, the plaintiff herein was a fraternal benefit society within the meaning of the law of the states of Iowa and Montana. Iowa Code 1897, Secs. 1822, 1824, 1825, and 1834; Iowa Codes of 1924, 1927, 1931, Secs. 8777, 8778, 8785, 8786, 8788, 8789, and 8792; and, 38 G. A. Iowa, ch. 240, approved April 16, 1919; ch. 140, Laws of Montana, 1911, Secs. 6305, 6306, 6307, 6308, 6309, 6311, 6313; and 6321, R. C. M. 1921 and 1935;

6. Becoming a member of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation; the rights of members have their source in the constitution and by-laws of the corporation and can only be determined by resorting thereto, and such constitution and by-laws must necessarily be construed by the laws of the state of its incorporation. Modern Woodmen of America v. Mixer, 267 U. S. 544, 550-'1; Royal Arcanum v. Green, 237 U. S. 532, 541-'2; Bush v. Modern Woodman of America, 182 Ia. 515, 162 N. W. 59, 60; Booz, et al. v. Booz, et al., ... Ia. ....., 167 N. W. 93, 94; Styles v. Byrne, 89 Mont. 243, 252-'3;

7. The statute of the state of Iowa is the organic law of the plaintiff in the case at bar. It is under this law that it lives, moves and has its being. From this law it gets its right to do business and by this law it is regulated and controlled. Bush v. Modern Woodmen of America, 182 Ia. 515, 162 N. W. 59,

60; Royal Arcanun v. Green, 237 U. S. 531, 542-'3; Modern Woodmen of America v. Mixer, 267 U. S. 544, 551; Styles v. Byrne, 89 Mont. 243; 254-'5;

8. The purpose and intent of the law making body in creating [59] and recognizing Fraternal Benefit Societies is not that they may do a general insurance business, but a fraternal business. Bush v. Modern Woodmen of America, 182 Ia. 515, 162 N. W. 59, 60; Modern Woodmen of America v. Mixer, 267 U. S. 544, 551; Nitsche v. Security Benefit Association, 78 Mont. 532;

9. The legislature of the state of incorporation has power to limit the classes of persons who may be beneficiaries of a fraternal benefit society. Bush v. Modern Woodmen of America, 182 Ia. 515, 162 N. W. 59, 60; Richey v. Sovereign Camp Woodmen of the World, ... Ia. ....., 168 N. W. 276, 280; Nitsche v. Security Benefit Association, 78 Mont. 532, 546, 255 Pac. 1052; Modern Woodmen of America v. Mixer, 267 U. S. 544, 550-'1;

10. At the time the plaintiff herein issued to James Victor Kohler, now deceased, its benefit certificate No. 177490 providing for death benefits in the sum of $2,000, wherein the defendant Mrs. Daisy S. Kohler, then the wife of said James Victor Kohler, was named as beneficiary, she was qualified to be designated as such thereunder by the laws of the states of Iowa and Montana. Iowa Code of 1897, Sec. 1824; R. C. M 1921, Sec. 6311; and, by the constitution and By-Laws of the Brotherhood of American Yeomen; Preamble; Article III of the Constitution of the Brotherhood of American Yeo-

men; Secs. 3 and 148 of the By-Laws of the Brotherhood of American Yeomen, effective September 1, 1921; John Hancock Insurance Co. v. Yates, 299 U. S. 178, 182-'3; American Surety Co. of New York v. Clarke, 94 Mont. 1, 9-10, 20 Pac. 2d. 831, 833; Styles v. Byrne, 89 Mont. 243, 252-'3, 296 Pac. 577; Richey v. Sovereign Camp Woodmen of America, ... Ia. ....., 168 N. W. 276, 280(18);

11. The defendant Mrs. Daisy S. Kohler could neither have nor obtain any vested interest in said benefit certificate until the same had become due and payable on the death of James Victor Kohler, 38 G. A. Ia., Ch. 240, approved April 16, 1918; Ia. Code 1924, 1927, 1931 and 1935, Sec. 8788; Sec. 6, Ch. 140, Laws of Montana, 1911, [60] Sec. 6311, R. C. M. 1921 and 1935; Bush v. Modern Woodmen of America, 182 Ia. 515, 162 N. W. 59, 61; Holden v. Modern Brotherhood of America, 151 Ia. 673, 132 N. W. 329, 331; Schmidt v. Northern Life Association, 112 Ia. 41, 83 N. W. 800, 802; Nitsche v. Security Benefit Association, 78 Mont. 532, 546-'7, 255 Pac. 1052;

12. That said James Victor Kohler had the right from time to time to have the beneficiary designated in said benefit certificate No. 177490 changed in accordance with the laws, rules and regulations of the society. 38 G. A. Ia., ch. 240, approved April 16, 1919, Ia. Codes 1924, 1927, 1931 and 1935, Sec. 8788, Sec. 6, Ch. 140, Laws of Montana, 1911, Sec. 6311, R. C. M. 1921 and 1935; cases cited under conclusion of law No. 11; Sec. 159 of the By-Laws of the

Brotherhood of American Yeomen, effective September 1, 1921, Sec. 123, id., effective June 13, 1925, Sec. 112, id., effective January 1, 1928, Secs. 112 and 113, id., effective June 12, 1929 and January 14, 1932; Bush v. Modern Woodmen of America, 182 Ia. 515, 162 N. W. 59, 61; Thomas v. Locomotive Engineer's Mutual Association, ... Ia. ....., 183 N. W. 628, 632; Sec. 6, Ch. 140, Laws of Montana, 1911, Sec. 6311, R. C. M. 1921 and 1935;

13. That immediately upon the entry of the decree of divorce in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, on February 20, 1929, wherein and whereby, among other things, it was "Ordered, adjudged and decreed: I. That the bonds of matrimony heretofore existing between plaintiff (Mrs. Daisy S. Kohler, interpolated.) and defendant (James Victor Kohler, interpolated,) be and the same hereby are wholly and permanently dissolved and the parties hereto freed from all of the obligations thereof; * * *;" She ceased to be qualified for designation as a beneficiary in said benefit certificate No. 177490 mentioned and referred to in conclusion of law No. 6 above; and thereupon she became and at all times thereafter she was and she now is entirely without right to claim or receive [61] any part or portion of the $2,000 paid by the plaintiff herein into the registry of the court, there to abide the judgment of the court. Ia. Code 1897, Sec. 1824, Ia. Code of 1924, 1927, 1931, and 1935, Sec. 8785; Articles of Incorporation of the

Brotherhood of American Yeomen; Sec. 3, By-Laws of the Brotherhood of American Yeomen, effective September 1, 1921, November 15, 1923, June 13, 1925, January 1, 1928, June 12, 1929, and January 14, 1932; Sec. 144, By-Laws effective September 1, 1921 and November 15, 1923, Sec. 105, By-Laws effective June 13, 1925, Sec. 101, By-Laws effective January 1, 1928 and Sec. 102, By-Laws effective June 12, 1929 and January 14, 1932; Sec. 146, By-Laws effective September 1921 and January 1, 1924, Sec. 107, By-Laws effective June 13, 1925, Sec. 103, By-Laws effective January 1, 1928 and Sec. 104, By-Laws effective June 12, 1929 and January 14, 1932; Sec. 159, By-Laws effective September 1, 1921, Sec. 123, By-Laws effective June 13, 1925, Sec. 112, By-Laws effective January 1, 1928, and Secs. 113 and 114, By-Laws effective June 12, 1929, and January 14, 1932.

Said Section 159 of the By-Laws of the Brotherhood of American Yeomen, effective September 1, 1921, and all of the sections of the By-Laws referred to thereafter, provide in effect that in case the beneficiary member makes his spouse the beneficiary in his certificate and said member and his spouse are divorced or legally separated by order of a court of competent jurisdiction before the death of the member, and said member makes no change in his beneficiary as named in the certificate, the benefits under said certificate shall be paid to the legal heirs of said deceased member. If for any cause the beneficiary named in the certificate is

barred by law from receiving the benefits provided in said certificate, the legal heirs of the deceased member shall become the beneficiaries, and the benefits provided for in said certificate shall be paid to such legal heirs. See Iowa Code of 1897, Secs. 1822, 1825, 1834, 1824; Iowa Code 1924, 1927, 1931, and 1935, Secs. 8778, 8791, 8792, 8785, 8788, and 8789; and, G. A. Iowa, ch. 240, approved April 16, 1919, Iowa Codes [62] of 1924, 1927, 1931, Secs. 8787, 8788 and 8789; Secs. 6311, 6313, R. C. M. 1921 and 1935; Nitsche v. Security Benefit Association, 78 Mont. 533, 546-7, 255 Pac. 1062, Sec. 6321, R. C. M. 1921 and 1935; Weiditschka v. Supreme Tent, Knights of Maccabees, ... Ia. ....., 170 N. W. 300, 301-'2 and 175 N. W. 835, 837; and, cases there cited.

It should always be remembered in this connection that the constitution of the Brotherhood of American Yeomen, effective September 1, 1921, provides that "this association shall be empowered to transact business in the United States and the Dominion of Canada", Article II; and that the By-Laws of the Brotherhood of American Yeomen, effective September 1, 1921, provide: 1. That one of the essential objects of the association is "to bestow substantial benefits upon him (the member, interpolated) and his beneficiaries as may be permitted by the laws of the state wherein this association shall operate"; Sec. 3; 2. That the liability of the association "for the payment of benefits upon its certificates, * * * shall not begin until all the acts, qualifications and requirements prescribed for the

applicant in these By-Laws shall have been fully complied with by him, nor until all acts required of the local examiner and the Homestead officers shall have been fully complied with, nor until his application shall have been approved by the Medical Director and a benefit certificate issued thereon and personally delivered to the applicant while in good health. A strict compliance with each and all of the details above referred to shall be a condition precedent to the validity of each and every benefit certificate issued by this association;" Sec. 144; 3. "No officer of this association or any person or persons whomsoever is authorized or permitted to waive any of the provisions of these By-Laws, and such officers and persons are hereby prohibited from waiving any provisions of these By-Laws;" Sec. 146; and, 4. That Section 148 (first) provides "that the statements in the application of said member, including his [63] answers in the medical examination, a copy of which appears upon the back hereof, and which is hereby made a part of this agreement, are true in every particular, and shall be held to be strict warranties, and shall, with the Articles of Incorporation and By-Laws of this association, form the only basis of this contract, for the liability of the association under this section the same as if fully set forth herein, * * *."

It should also be borne in mind in this connection that at the time said benefit certificate No. 177490 was issued to said James Victor Kohler on July 26, 1923, the Brotherhood of American Yeo-

men was operating in the State of Montana through its Homestead No. 546, located at Helena, Montana, and that said benefit certificate was personally delivered to said James Victor Kohler at that place. Sec. 6313, R. C. M. 1921 and 1935; John Hancock Insurance Co. v. Yates, 299 U. S. 178, 182, Weiditschka v. Supreme Tent, Knights of Maccabees, ... Ia. ....., 170 N. W. 300, 301-'2 and 175 N. W. 835, 837; Nitsche v. Security Benefit Association, 78 Mont. 532, 546-'9; Code of Iowa, 1924, 1927, 1931, 1935, Sec. 11921; Thomas v. Locomotive Engineer's Mutual Life and Accident Association, 191 Ia. 1152, 183 N. W. 628, 639-40; Secs. 10581 and 7521, R. C. M. 1921; Nelson v. Davenport, et al., 86 Mont. 1, 6-7, 281 Pac. 537.

14. That the object of that portion of the agreement entered into by and between James Victor Kohler and the defendant Mrs. Daisy S. Kohler, on February 20, 1929, in words and figures as follows: "10. That party of the first part (James Victor Kohler, interpolated,) agrees that he will pay the premium on a certain policy of life insurance in the sum of Two Thousand Dollars ($2,000) in which the party of the second part (Mrs. Daisy S. Kohler, interpolated,) is beneficiary and she shall remain the beneficiary, said policy of insurance being known as a Yeomen Beneficiary Certificate", was not lawful, said parties were not capable of contracting with reference thereto, the same was contrary to express provision of law as well as to [64] the policy of express law and otherwise contrary to good

morals and in direct violation of the constitution and By-Laws of the Brotherhood of American Yeomen, with the result that the same then was, at all times since then has been and now is void and of no legal force or effect. Secs. 7467, 7468, 7498, 7499, 7553, 6311, and 7502, R. C. M. 1921; Nitsche v. Security Benefit Association, 78 Mont. 532, 546-'7(3), 255 Pac. 1052, Thomas v. Locomotive Engineer's Mutual Life and Accident Association, 191 Ia. 1152, 183 N. W. 628, 639-'40; Weiditschka v. Supreme Tent, Knights of Maccabees, ... Ia. ....., 170 N. W. 300, 301-'2 and 175 N. W. 835, 837; and cases there cited; Codes of Ia. 1897, 1924, 1927 and 1931; Ia. Code of 1897, Secs. 1822, 1825, 1834 and 1824; Ia. Code of 1924, 1927, 1931 and 1935, Secs. 8777, 8778, 8791, 8792, 8785 and 8787; and 38 G. A. Ia., ch. 240, approved April 16, 1919;

15. If the defendant Mrs. Daisy S. Kohler had acquired any right to, under or by virtue of said benefit certificate No. 177490, under or as a result of the agreement mentioned and set out in conclusion of law No. 14 above, she lost the same as a result and under and by virtue of the understanding and agreement entered into by and between her and said James Victor Kohler on September 9, 1930. See further findings of fact numbered 13, 16, 17, 18, 19, 20 and 21, pages 43 and 45 to 47 above; and that to hold that she now has or at any time since she entered into the understanding and agreement herein referred to has had any right to, under or by virtue of said benefit certificate No. 177490 or the

money paid by the plaintiff herein into the registry of the court, there to abide the judgment of the court, would be to allow her to change her purpose to the injury of another,—the defendant Mrs. Clara Kohler; and to infringe upon the rights of and to perpetrate a fraud upon the latter as well as to take advantage of her own wrong which the law does not permit. Secs. 8738, 8741, 8743, [65] 7479, 7480, 7481, subds. 4 and 5, 8746 and 8752, R. C. M. 1921 and 1935; Bullard v. Zimmerman, et al., 82 Mont. 434, 481, 286 Pac. 512;

16. That when the decree of divorce hereinbefore referred to was rendered and entered therein on February 20, 1929, the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, did not have in mind or intend or attempt to transfer to the defendant Mrs. Daisy S. Kohler any right to, under or by virtue of the benefit certificate involved in this suit, the decree provides only for the permanent dissolution of the bonds of matrimony then existing between Mrs. Daisy S. Kohler and James V. Kohler, the custody of their children; and the payment by him to her of money as alimony for the support of the children and herself. See copy of decree of divorce attached to the separate answer and cross complaint of the defendant Mrs. Clara Kohler filed herein March 30, 1934; Secs. 10519, 10558 and 10561 R. C. M. 1921 and 1935; State ex rel Durland v. Board of County Commissioners, ... Mont. ....., 64 Pac. 2d. 1060, 1061-'2;

17. That had said state court intended or attempted to transfer to the defendant Mrs. Daisy S. Kohler the benefit certificate involved in this suit it was without legal power to do so. The rule in Montana is that under no circumstances could the court transfer the title absolutely. Thrift v. Thrift, 54 Mont. 463, 464, 171 Pac. 272;

18. That at no time after September 9, 1930, was the defendant Mrs. Daisy S. Kohler a person dependent upon said James Victor Kohler within the meaning of the law of Iowa or Montana or the constitution and the By-Laws of the Brotherhood of American Yeomen. Iowa Code 1897, Sec. 1824; Iowa Codes of 1924, 1927, 1931 and 1935, Sec. 8785; Sec. 6311, R. C. M. 1921 and 1935; Bush v. Modern Woodmen of America, ... Ia. ....., 152 N. W. 31, 39; Richey v. Sovereign Camp W. O. W., ... Ia. ....., 168 N. W. 276, 278 and cases there cited; [66]

19. That at all times after the defendant Mrs. Clara Kohler and the said James Victor Kohler were united in marriage on March 11, 1929, she was qualified to be designated as the beneficiary in said benefit certificate No. 177490 and in the duplicate certificate of membership bearing the same number issued by the Brotherhood of American Yeomen to said James Victor Kohler, on March 11, 1932, which provided for the payment of death benefits in the sum of $2,000 to the defendant Mrs. Clara Kohler, then and at all times thereafter to the time of the death of said James Victor Kohler the wife of said

James Victor Kohler. Iowa Code 1897, Sec. 1824; Iowa Codes 1924, 1927, 1931 and 1935, Sec. 8785; Sec. 6311, R. C. M. 1921 and 1935;

20. That upon said James Victor Kohler, while a member in good standing of Homestead No. 546 of the Brotherhood of American Yeomen located at Helena, Montana, causing said duplicate certificate of membership bearing No. 177490, which provided for the payment of death benefits in the sum of $2,000 to the defendant Mrs. Clara Kohler, then his wife, to be issued to him by the Brotherhood of American Yeomen she became and at all times remained entitled to the payment of said benefit in the event of the death of said James Victor Kohler. See duplicate certificate No. 177490; secs. 113, 114 and 115 of the constitution and By-Laws of the Brotherhood of American Yeomen, effective January 14, 1932; Sec. 6311, R. C. M. 1921 and 1935; 38 G. A. Ia., ch. 240, approved April 16, 1919; Iowa Codes 1924, 1927, 1931 and 1935, Secs. 8785, 8787 and 8788; and,

21. That upon the death of said James Victor Kohler, on May 9, 1933, the defendant Mrs. Clara Kohler became, ever since then she has been and she now is entitled as the beneficiary named in said duplicate certificate of membership bearing No. 177490, to the $2,000 paid by the plaintiff herein into the registry of the court, there to abide the judgment of the court, subject, however, to the deductions authorized by law and hereinbefore mentioned and set out. [67]

It follows that it should be and it is hereby ordered:

1. That the plaintiff herein be and it is hereby discharged from further liability to the defendants Mrs. Clara Kohler and Mrs. Daisy S. Kohler, or either of them, based on, growing out of or arising from the issuance by it of its said certificate of insurance No. 177490, on July 26, 1923, providing for death benefits in the sum of $2,000, wherein the defendant Mrs. Daisy S. Kohler, then the wife of said James Victor Kohler, the insured and now deceased, was named as beneficiary, or its duplicate certificate of membership bearing the same number issued by it on March 11, 1932, to the said James Victor Kohler after his divorce from the defendant Mrs. Daisy S. Kohler, which provided for the payment of death benefits in the sum of $2,000 to the defendant Mrs. Clara Kohler, then and at all times thereafter to the time of the death of said James Victor Kohler, on May 9, 1933, the wife of said James Victor Kohler;

2. That the defendants Mrs. Clara Kohler and Mrs. Daisy S. Kohler, and each of them, should be and they are hereby enjoined permanently from instituting or prosecuting any suit or proceeding in any state court or in any federal court on said certificate of insurance No. 177490 and said duplicate certificate of membership bearing the same number so issued by the plaintiff herein as aforesaid, or either of them;

3. That the plaintiff herein is not chargeable with interest on the money paid by it into the registry of the court, there to abide the judgment of the court, or otherwise or at all;

4. That the plaintiff herein should be and it is hereby allowed its costs and disbursements herein necessarily expended, including a reasonable attorney's fee hereby fixed by the court at the sum of $150, to be paid out of the money paid by it into the registry of the court, there to abide the judgment of the court;

5. That in addition to the fees for other services rendered in this suit in equity, the clerk of this court shall charge, collect and deduct therefrom one per centum of the $2,000 paid by the plaintiff herein into the registry of the court, there to abide the [68] judgment of the court, pursuant to statute, for receiving, keeping and paying out said money pursuant to said statute and by order of this court;

6. That the defendant Mrs. Daisy S. Kohler is and at the time the Bill of Interpleader was filed herein on January 19, 1934, she was entirely without right to claim, receive or recover any part or portion of the $2,000 paid by the plaintiff herein into the registry of the court, there to abide the judgment of the court, or any relief of any kind, character, nature or description whatsoever in this suit in equity;

7. That the clerk of this court shall pay to the defendant Mrs. Clara Kohler, on demand, the balance of the $2,000 paid by the plaintiff herein into the registry of the court, there to abide the judg-

ment of the court, remaining in the registry of the court after the deductions authorized and directed to be made by paragraphs "4" and "5" of this order have been made; and,

8. That the defendant Mrs. Clara Kohler do have and recover of and from the defendant Mrs. Daisy S. Kohler her costs and disbursements herein necessarily expended, together with the total amount of all deductions authorized and directed to be made by paragraphs "4" and "5" of this order.

Decree will be entered accordingly.

Done in open court at Helena, Montana, June 15, 1937.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed June 15, 1937. [69]

Thereafter, on June 21, 1937, Decree was duly filed and entered herein in the words and figures following, to-wit: [70]

In the District Court of the United States for the Helena Division of Montana.

In Equity—No. 1494.

YEOMEN MUTUAL LIFE INSURANCE COMPANY, formerly Brotherhood of American Yeomen, a corporation, Des Moines, Iowa,

Plaintiff,

vs.

MRS. CLARA KOHLER, 3 North Main Street, Helena, Montana, and MRS. DAISY S. KOHLER, 501 O & B Building, Spokane, Washington,

Defendants.

DECREE.

This case having duly and regularly come on for trial before the court sitting without a jury in Helena, Montana, on the 22nd day of January, 1936. The plaintiff was represented by Messrs. Wellington D. Rankin and Arthur P. Acher, its attorneys. The defendant Clara Kohler, was present in court in person and represented by Messrs. Paul W. Smith and David R. Smith, her attorneys; and the defendant, Daisy S. Kohler was present in court and represented by Mr. T. H. MacDonald, her attorney, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the court being fully advised in the

premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; Now, Therefore, by reason of the law and findings aforesaid:

It is hereby ordered, adjudged and decreed:

1. That the plaintiff herein be and it is hereby discharged from further liability to the defendants Mrs. Clara Kohler and Mrs. Daisy S. Kohler, or either of them, based on, growing out of or arising from the issuance by it of its said certificate of insurance No. 177490, on July 26, 1923, providing for death benefits in the sum of $2,000, wherein the defendant Mrs. Daisy S. Kohler, then the wife of said James Victor Kohler, the insured and now deceased, was named as beneficiary, or its duplicate certificate of membership bearing the same number issued by it on March 11, 1932, to the said James Victor Kohler after his divorce from the defendant Mrs. Daisy S. Kohler, which provided for the payment of death benefits in the [71] sum of $2,000 to the defendant Mrs. Clara Kohler, then and at all times thereafter to the time of the death of said James Victor Kohler, on May 9, 1933, the wife of said James Victor Kohler;

2. That the defendants Mrs. Clara Kohler and Mrs. Daisy S. Kohler, and each of them, should be and they are hereby enjoined permanently from instituting or prosecuting any suit or proceeding in any state court or in any federal court on said certificate of insurance No. 177490 and said duplicate

certificate of membership bearing the same number so issued by the plaintiff herein as aforesaid, or either of them;

3. That the plaintiff herein is not chargeable with interest on the money paid by it into the registry of the court, there to abide the judgment of the court, or otherwise or at all;

4. That the plaintiff herein is hereby allowed the sum of $150.00 to be paid to it by the Clerk of this Court out of the money paid by said plaintiff into the registry of the court and its costs and disbursements herein necessarily expended, taxed at $51.73.

5. That the clerk of this court is hereby allowed the sum of $20.00 to be paid out of the money paid to said clerk by said plaintiff and to be deducted by said clerk from said money.

6. That the defendant Mrs. Daisy S. Kohler is entirely without right to claim, receive or recover any part or portion of the said sum of $2,000.00 paid by the plaintiff herein into the registry of the court and is without any relief of any kind, character, nature or description in this suit in equity.

7. That the defendant Mrs. Clara Kohler is hereby allowed the sum of $2000.00 paid by the plaintiff herein into the registry of the court, less the sum of $150.00 plaintiff's attorneys fee, the sum of $20.00, the clerk's fee, and the sum of $51.73 plaintiff's costs herein necessarily expended and taxed by the court; and said remaining sum shall be paid by the clerk of this court to the defendant Mrs. Clara Kohler.

8. That the defendant Mrs. Clara Kohler do have and recover of and from the defendant, Mrs. Daisy S. Kohler, the sum of $170.00, also costs and disbursements herein necessarily expended by said Mrs. Clara Kohler and taxed at $16.83. [72]

Dated: June 21, 1937.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed and entered June 21, 1937. [73]

Thereafter, on June 26, 1937, Assignment of Errors was duly filed herein in the words and figures following, to-wit: [74]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant Daisy S. Kohler by and through her attorney and solicitor and makes and files her assignments of error as follows:

I.

The Court erred in allowing any attorneys fee to the plaintiff.

II.

The Court erred in entering its decree that plaintiff is not chargeable with interest on the money paid by it into court.

III.

The Court erred in entering in its decree that the defendant Daisy S. Kohler is without right to recover any portion of the sum of two thousand dollars paid by the plaintiff into court.

IV.

The Court erred in entering its decree that the defendant Clara Kohler be allowed the sum of two thousand dollars paid into court by plaintiff.

V.

The Court erred in entering its decree that the Defendant Clara Kohler do have and recover from Defendant Daisy S. Kohler the sum of [75] one hundred and seventy dollars with costs and disbursements taxed at $.....

VI.

The Court erred in finding that the Defendant Daisy S. Kohler was not a legal dependent on the deceased Victor Kohler at any and all times after their divorce to the time of his death.

VII.

The Court erred in finding that the amount received by Daisy S. Kohler was to be in full settlement for all matters described in the alimony agreement and particularly erred in finding such agreement applied to the certificate of insurance in this case.

VIII.

The Court erred in finding that before Daisy S. Kohler was paid one thousand dollars in September 1931 it was understood that she would give up the policy of insurance with the understanding that Clara Kohler would advance the one thousand dollars.

Wherefore, Appellant prays that the judgment and decree of the District Court for the Helena Division of Montana may be reversed with directions to said District Court to take such action thereafter as may be proper in the premises in accordance with the decision rendered therein.

T. H. MACDONALD,
Attorney for Appellant.

Copy of the above assignment had and service admitted this 23rd day of June, 1937.

Personal service of within Assignments made and admitted, and receipt of true copy thereof acknowledged this 26th day of June, 1937.

WELLINGTON D. RANKIN,
ARTHUR P. ACHER,
Attorneys for Plaintiff.
PAUL W. SMITH &
DAVID R. SMITH,
Attorneys for Clara Kohler.

[Endorsed]: Filed June 26, 1937. [76]

Thereafter, on June 26, 1937, Petition for Appeal was duly filed herein, in the words and figures following, to-wit: [77]

[Title of District Court and Cause.]

PETITION FOR APPEAL.

Comes now defendant Daisy S. Kohler and conceiving herself aggrieved by the decree of the above entitled court entered herein on the 22nd day of June 1937, does hereby appeal from the said decree and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit and prays that her appeal be allowed and that a transcript of the record and the proceeding and papers upon which said decree was made, and entered, duly authenticated may be sent to the United States Court of Appeals, Ninth Circuit.

T. H. MACDONALD,
Attorney for Defendant and Appellant
Daisy S. Kohler.

Personal service of within Petition made and admitted, and receipt of true copy thereof acknowledged this 26th day of June, 1937.

WELLINGTON D. RANKIN,
ARTHUR P. ACHER,
PAUL W. SMITH &
DAVID R. SMITH,
Attorneys for Plaintiff & Clara Kohler.

[Endorsed]: Filed June 26, 1937. [78]

Thereafter, on June 26, 1937, Allowance of Appeal was duly filed herein, in the words and figures following, to-wit: [79]

[Title of District Court and Cause.]

ALLOWANCE OF APPEAL.

And now to-wit, on this 26th day of June, 1937, it is ordered that the appeal herein be allowed as prayed for, and it is further ordered that a bond in the sum of Three hundred dollars with sureties to be approved by the Court be given for the payment of all costs which may hereafter be incurred against the said Defendants and Appellants in the United States Circuit Court of Appeals for the Ninth Circuit and for the payment of all damages which may be sustained by the respondents by reason of said appeal and that such bond shall stay the decree rendered and entered in this Court.

Signed this 26th day of June, 1937.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 26, 1937. [80]

Thereafter, on June 26, 1937, Bond on Appeal was duly filed herein, in the words and figures following, to-wit: [81]

[Title of District Court and Cause.]

BOND ON APPEAL.

Know all men by these presents, that we Daisy S. Kohler and United States Fidelity and Guaranty Company, of Baltimore, Maryland, as sureties are

held and firmly bound to the above named plaintiff and Clara Kohler defendant in the sum of Three hundred dollars ($300.00) lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment well and truly to be made, we bind ourselves and each of us, our successors and assigns, jointly and severally by these presents.

Whereas the above-named plaintiff has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States, in and for the District of Montana, Great Falls Division in the above-entitled cause.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff shall prosecute its said appeal to effect and answer all costs, and all damages awarded against her if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 26th day of June, 1937. [82]

DAISY S. KOHLER
By T. H. MACDONALD,
As her Attorney.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By L. K. ALBRECHT,
Attorney-in-Fact.

Approved June 26, 1937.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 26, 1937. [83]

Thereafter, on June 26, 1937, Citation on Appeal was issued herein, which original Citation is hereto annexed and is in the words and figures following, to-wit: [84]

[Title of District Court and Cause.]

CITATION ON APPEAL.

To Yeomen Mutual Life Insurance Company, formerly Brotherhood of American Yeomen, a corporation, Des Moines, Iowa, and Mrs. Clara Kohler, 3 North Main Street, Helena, Montana, Greeting:

You are cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal taken, allowed and filed in the office of the Clerk of the United States District Court, for the District of Montana, on the 26th day of June, 1937, in that certain suit, being In Equity No. 1494, wherein Daisy S. Kohler is appellant and Yeomen Mutual Life Insurance Company, formerly Brotherhood of American Yeomen, a corporation, Des Moines, Iowa, and Mrs. Clara Kohler, 3 North Main Street, Helena, Montana, are respondents, to show cause, if any there be, why the judgment and decree made and entered in the above-entitled action, in said appeal mentioned, should not be reversed, and why speedy relief should not be done the parties in this behalf.

Dated this 26th day of June, 1937.

CHARLES N. PRAY,
District Judge. [85]

Due personal service of within Citation made and admitted, and receipt of true copy thereof acknowledged this 26th day of June, 1937.

.....

Attorney for Plaintiff
WELLINGTON D. RANKIN,
ARTHUR P. ACHER,
Attorneys for Clara Kohler.

Received July 1, 1937.

PAUL W. SMITH,
DAVID R. SMITH,
Attorneys for Defendant Clara Kohler.

[Endorsed]: Filed July 1, 1937. [86]

Thereafter, on July 19, 1937, Testimony to be included in Transcript on Appeal was duly lodged in the Clerk's office, being in the words and figures following, to-wit: [87]

[Title of District Court and Cause.]

TESTIMONY TO BE INCLUDED IN TRANSCRIPT ON APPEAL.

Appearances:

H. W. Pitken, Des Moines, Iowa
J. G. Bowes, Des Moines, Iowa
Wellington D. Rankin, Helena, Montana
Attorneys for Plaintiff.

Paul W. Smith, Helena, Montana
David R. Smith, Helena, Montana
Attorneys for Mrs. Clara Kohler.

T. H. MacDonald, Helena, Montana
Attorney for Mrs. Daisy S. Kohler.

"Mr. Arthur Acher on behalf of the plaintiff offered in evidence plaintiff's Exhibit 1, which was received in evidence without objection. (Said Exhibit 1, a series of letters between the respective parties prior to the institution of this action, will be transmitted to the Circuit Court of Appeals in its original form, and is hereby incorporated herein, and by this reference made a part hereof.)

"MR. S. C. FORD

called as a witness for the plaintiff, being duly sworn, testified as folows:

(Testimony of S. C. Ford.)

Direct Examination

By Mr. Acher:

My name is S. C. Ford. I am a duly licensed and practicing attorney—practicing in Helena, Montana; former Attorney General for the State and former Associate [112] Justice of the Supreme Court, and admitted to practice in all courts in Montana, including the Federal Court.

The Court: Let the record show that he is one of the ablest lawyers in Montana.

S. C. Ford: Thank you.

Mr. Acher: Judge Ford, in this action the plaintiff, insurance company, filed a Bill of Interpleader under the Federal statute, setting forth that there were two claimants to the policy of insurance—the first wife and the second wife; the first wife being divorced. Both being claimants, it was necessary that the attorneys for the plaintiff obtain an order of court from Judge Bourquin, then the Judge of this District, granting permission to file the Bill of Interpleader and ordering that process issue. Thereafter the defendants appeared by motion to strike, and an appearance was made in Court at that time. Thereafter the defendants filed answers and cross-complaints wherein they set up their respective rights as against each other, and in their answers they denied that the suit had been filed with reasonable diligence, or the insurance company entitled to attorneys fees, and alleged that the insurance com-

(Testimony of S. C. Ford.)

pany should pay interest on the sum of $2000, at that time deposited in court, when the suit was filed. Two replies were filed, one to each answer and cross complaint. Thereafter the case come on for hearing this day, and it was necessary that counsel for the insurance company appear in this action—some proof having been offered as to the proceedings that had been had between the claimants and the insurance company before the Bill of Interpleader was filed; that is this correspondence that had led up to the filing of the suit. In view of this fact, Judge, what in your opinion would be a reasonable attorneys fee to be allowed to the plaintiff insurance company in this case?

A. I believe $250.00 would be a reasonable attorneys fee."

Thereafter witness E. G. Toomey and C. A. Spaulding attorneys-at-law testified to the same effect and fixed the sum of $250.00 as a reasonable fee.

MRS. DAISY S. KOHLER

called as a witness in her own behalf.

I am Daisy S. Kohler one of the defendants in this case, fifty-nine years old.

I was dependent on J. Victor Kohler at the time of his death for support. At the time of the death of J. Victor Kohler, I had an income from an inheritance from my mother which amounted to about ten dollars per month.

(Testimony of Mrs. Daisy S. Kohler.)

From the time of my divorce from Mr. Kohler I earned approximately $250.00 per year doing substitute work.

Between the time of my divorce and Mr. Kohlers death I supported [113] myself and children the first year by working in a hat shop in California for about six months at eighteen dollars per week. Then my son sent for me to come to Spokane because work was getting hard for me at the time. After the divorce I had two complete payments of alimony. That was all then. Then there was for several months that I didn't have any, after I went to California. Then there was one time that I got the alimony. I didn't have my mother's money then, Mother didn't pass away till 1930.

In September 1930 I sold J. Victor Kohler my half interest in the business and he gave me one thousand dollars cash and a note for three thousand dollars, that was to pay for one half of the business he had given me; he owed me at that time $1700.00 in alimony. I sold that back to him because he had not paid the alimony. He couldn't pay because he didn't have the money at that time.

From that time up to the time of his death I received from him approximately fifty dollars per month, outside of that and then $10.00 per month from my Mother's estate I had nothing except when I could find work myself.

My daughter is also Victor Kohler's daughter, she is twenty years old. I also at that time had a minor

(Testimony of Mrs. Daisy S. Kohler.)
son. His father was to give me fifty dollars for him and thirty dollars for the younger child who at that time was between eleven and twelve years old—the other child was between seventeen and eighteen—that was to be paid outside of the alimony, but nothing was paid at this time, I mean the fifty and thirty dollars provided in the decree of divorce. I received from Victor Kohler up to the time of his death substantially the amount of fifty dollars per month.

My youngest son did not have work and I could not support him, he did not have an education, so he joined the marines. I gave my consent because he was a minor, that was all that I could do.

The older children had college degrees, the younger children would have gone to college if our home had not been broken up. It was their father's intention.

Clara Kohler, the other defendant, was consulted with reference [89] to the property settlement. At the time she had gone to Aberdeen, Washington. I saw one letter of the correspondence between her and J. Victor Kohler with reference to the property settlement. I knew of one letter he wrote asking her if she would agree to the terms. (Copy of that letter identified and admitted in evidence)

(Testimony of Mrs. Daisy S. Kohler.)

Defendant Daisy S. Kohler's

EXHIBIT No. 2.

"Jan. 17

"My dear Boy:

Your letter came this A. M. just before I left for work. The contence was carefully considered. I am very sorry to even think you would ask me to sign such an obligation. You know, Dear, that things happen when we are least expecting it and attorneys can get by with murder these days. No, I wouldn't for one moment have my children suffer for her selfish desires. I seems if she cant get it all in one way she must sceam another. You have done all possible for your children and giving her part should be enough. I want to not be tied to her in any way or form when married to you. I know the time draggs but after waiting for so long and then be such a fool! No! never.

I would think after what has happened she would be glad to go away and feel as tho she was fortunate to get what she has. She may think she is smart, but she has to go some to beat me. I know her one failing.

The candy arrived yesterday, Darling, and as I have found it will not do me any harm as to my skin, I am certainly enjoying it. I want to thank my thoughtful Darling for sending it to me.

Lovingly yours,

Clara"

(Testimony of Mrs. Daisy S. Kohler.)

Cross Examination

By Mr. Smith:

I did not come to Helena in September 1930 for the purpose of selling the store. I came to see if I could get some of the back alimony due me as I was without money and living with my son. I talked to your father, who was my lawyer at the time, and both he and Mr. Schroeder told me that Mr. Kohler's business was just about on the rocks, and likely to be closed at any moment, and they would advise me, if at all possible, to sell my one-half interest in the store, thereby getting a little money, because he had not been giving this to me. The business was doing nothing—it was gone, and under their direction I saw Mr. Kohler and he was agreeable to the sale, and he asked me what I wanted for my interest and I said "$5,000". He said he would give me $3,000.00. He later agreed to make $1,000 [90] payment in cash and gave me a $3,000 note. They advised me to get out of the business so that I would not be liable for one-half of the debts of the business. At this time—We talked about the business, but there wasn't any actual agreement. Before the decree of divorce we just talked together, he couldn't pay me any money and Loble was worrying him somewhat about this, and he asked me to see if I could take Loble off his trail. He wanted me to agree to take this $1,000 in cash and not insist on this divorce alimony at that time, because he just couldn't pay it. I knew he could not at that time, because he just didn't have the money. He said if

(Testimony of Mrs. Daisy S. Kohler.)

I would accept $50.00 a month as payment on the note and let him free of the alimony that he would continue to take care of the children and just as soon as he got on his feet and the business built back up, he said "You know I will take care of you as long as you live. Just take Lester Loble off my trail and I will be glad to buy this business and as soon as I can I will do all I can for you." That, of course, was verbal. That is all there was to it.

Q. Along about September 9, 1930 did you not agree that the insurance policy would be returned to Mr. Kohler. Didn't you agree with him about this at the store?

A. I certainly did not.

Q. Well, the insurance policy was discussed, was it not?

A. Never. He never mentioned the insurance policy at any time except the day he handed it to me in Lester Loble's office, and he said that it was for my future protection. He said "I know that I have earning power which you do not have, and I know you can't earn as much as I can." That was for my future protection and he never mentioned the policy at any time after that. We never entered into any agreement whatever, except that I stopped insisting on having the alimony, and that he would buy my part of the business. There was no reference made to the policy at all. Then or at any time. In Mr. Schroeder's letter he said that Mr. Kohler wanted the policy returned to him, which I [91] refused to do, because he had given it to me and it

(Testimony of Mrs. Daisy S. Kohler.)
was in the agreement in court that I was to have that policy and he was to keep up the payments. There was never any mention of the policy between Mr. Kohler and myself after that. The policy was mine, given to me for my protection and it is mine today. It has always been mine.

Mr. Schroeder wrote to me and asked me about returning it, and then some time after that the insurance company asked me to turn it over and I said I would not. As to my actual words, right now I don't remember them. I refer to the Yeomans Mutual Life Insurance Company.

Mr. Schroeder just was helping me with my real estate. When he wrote to me about the house that Mr. Hagler was renting, he also wrote about this policy. He said Mr. Kohler had asked him to get it for him.

EXHIBIT No. 3

for Clara Kohler admitted.

"March 7th, 1931

Mrs. Daisy S. Kohler,
611 Garden Ave.,
Coeur d' Alene, Idaho.
Dear Mrs. Kohler:

I was in Mr. Kohler's store yesterday and he asked about a life insurance policy which I believe he said was with the American Yeoman, and he said he would like to have this policy returned to him. I do not seem to remember very much about this matter in connection with your original deal with him.

Would you mind writing at your convenience and tell me how this matter stands.

Very truly yours,

PGS M P. G. Schroeder"

EXHIBIT No. 5

for Clara Kohler admitted

"414 Powell Bldg.,

" Coeur D'Alene, Idaho

" March 10, 1931.

Dear Mr. Schroeder:

In regard to the insurance policy that Mr. Kohler would like returned to him, I do not feel that it is necessary to make any reply for Mr. Kohler, but, to you, for your own personal knowledge I will be glad to tell you that Judge Smith has the original contract, and it states that the policy had been given to me, and that Mr. K. was to keep up the payments on it.

In view of the fact that I helped equally with him to pay for the policy for 30 yrs. and for my childrens rights, as well as mine, I [92] do not see that it is right for me to give it to Miss Hardie.

She no doubt will outlive us both, and I believe the children should have the benefits, and that just brings a question to my mind. Would my children benefit by the policy if I were to die before Mr. K.

I suppose if I refuse to give him the policy he will stop the payments.

I would be glad to have your advice in this matter, wish I were near enough to talk it over

(Testimony of Mrs. Daisy S. Kohler.)

with you as I am not let me assure you again, Mr. Schroeder that I am eternally grateful for all of your kindness.

Sincerely yours,
DAISY S. KOHLER".

and in reply to that letter Exhibit 6 for Clara Kohler is a follows:

"March 24th, 1931

Mrs. Daisy S. Kohler,
414 Powell Bldg.,
Coeur d'Alene, Idaho
Dear Mrs. Kohler:

I talked with Judge Smith about the life insurance policy and he brings up several points which may be of interest. For one thing we all know that with an assessment company the insured can very quickly lose all rights under the policy and have it declared void by non-payment of the stated assessment. Then the matter of the terms and conditions as outlined in the policy.

With a fraternal policy it would probably be found references made to the constitution and by laws, so before any one can really learn very much about what can or what cannot be done, it is necessary to read all of these things.

Judge Smith suggests that under some conditions he has known of a fraternal body, whatever its name is, entirely refuse to pay a loss on a policy when the beneficiary of record is no

(Testimony of Mrs. Daisy S. Kohler.)

longer living at the time of the death of the insured. He says further that he doubts whether this company would pay a loss to you now that the insured has another wife. The policy probably emphasizes the fact that the next of kin would be recognized and you being removed from this situation, there is grave doubt in his mind whether you would ever realize anything from the policy.

The suggestion, therefore, is that you read all these documents carefully and see what light may be thrown on the subject.

With best personal regards, I remain

PGS M Very truly yours,

And

EXHIBIT 4

for Clara Kohler is the answer to that letter.

"Coeur d'Alene, Idaho,
April 7th, 1931.

Mr. P. G. Schroeder,
Helena, Montana
Dear Mr. Schroeder: [93]

Your letter regarding the insurance followed me over to Pullman where I was supplying for two weeks and back here, so that I have only had it a few days.

The Yoeman Lodge here advise me to write to the home office and give them certain information which I do not possess so I am reply-

(Testimony of Mrs. Daisy S. Kohler.)

ing on your generosity again to ask if you will find out for me in what public record our agreement, at time of divorce, is recorded.

The lodge here seem to think inasmuch as Mr. Kohler mentioned giving me the Yoemen policy and saying that he would keep it up for me in his agreement might make it valid.

They suggest that I know just where this agreement is recorded, number of pages, etc., so that I can give this information to the head office when I write.

I believe Judge Smith has this agreement to, if you cared to look at it.

Would it not be a good idea to ask Mr. Berry, living over the Auditorium who is secretary for the Yoeman there, if Mr. Kohler has kept up his payments or perhaps you know this from Mr. Kohler himself.

In my reply to your letter before, perhaps I was a little rude in my reply to be given Mr. Kohler. I really do not want to be anything but kind to him, but I remember at the moment I read your letter I felt that he was trying to take the little I had away from me, and I was bitter for the moment, but now I realize he cannot take any eternal good from me, and that is all that counts, so if you think I should give him an answer, you may say I am thinking it over.

(Testimony of Mrs. Daisy S. Kohler.)

I will be very grateful for this information, Mr. Schroeder.

With best wishes,

Sincerely yours,
DAISY S. KOHLER.

The interest on the note Mr. Kohler gave me was given me each month with the $50.00, whatever it happened to be. I don't remember the exact amount.

I was to get $3,500 according to Mr. Kohler out of the Hagler mortgage but all I got was $1,700.00. It was not quite $1,700—nearer $1,600, $1,675.00 or something like that.

I did not get $780.00 out of the Mason agreement. There wasn't any lump sum, but I couldn't tell you just how much. I think $25.00 a month—but I don't remember for how long.

Q. Did you get the Buick car, which was referred to.

A. He promised me an automobile—promised to have one delivered by a certain date; that was in the court agreement, but, of course, that was at a time when he didn't have any money. He asked me not to press him too hard until he got on his feet—that he would do all that he could for me when he [94] got the business going again. Of course, I never got the car, and really never did expect it. I did at the time of the agreement, but I didn't after so much time had gone by.

(Testimony of Mrs. Daisy S. Kohler.)

He paid my fare to Connecticut to visit my daughter, who was having an operation.

He sent me to California to live and sent our goods down there and paid the freight. He said that he was coming there with me the first of June and he sent me down, and I was to put the children in school. I rented a small furnished apartment at first, and then he sent the furniture and promised to be there by the first of June, but when the first of June came he didn't come.

Q. That is all.

Redirect

By Mr. MacDonald.

I wrote the Yoemans Insurance Company about this contract.

Q. About the time of your correspondence with Mr. Schoreder.

A. Well, no, it was quite a little bit after that. I don't remember. Maybe one or two months, before I had a letter from the company saying that Mr. Kohler was going to change the beneficiary, and would I please return the policy. I wrote back and said "No, I would not send the policy, because it had been given to me in a court agreement", and then I had another letter from the company.

Mr. MacDonald: Just a moment.

The Court: Let her finish.

A. They advised me to hold the policy as they said the law might be changed. The Yoeman Company themselves told me to hold the policy, saying

(Testimony of Mrs. Daisy S. Kohler.)

they hoped to change the law, and if they did that I would have no trouble in getting my money.

Mr. MacDonald: (reading)

"Mrs. Daisy S. Kohler
414 Powell Bldg.,
Coeur d'Alene, Idaho

Dear Madam:

We have referred your letter of April 21st to our General Counsel, Mr. H. W. Pitkin. [95]

He suggested that we advise you that we are now attempting to secure a change in the laws regarding the payment of the benefits of a certificate to a divorced spouse. In his opinion, this change will probably be made in the laws within the next two years and his suggestion is that you allow the beneficiary to stand on this certificate as it now is as under the new law, which we are trying to have passed, a divorced husband or wife may secure the benefits of a certificate.

Fraternally yours,
THE BROTHERHOOD OF AMERICAN YOEMEN
By: GEO. F. WALL,
AB: Secretary"

Cross Examination

By Mr. Acher for plaintiff.

I have lived in Montana for some forty years, Mr. Kohler was a resident of this county and his

(Testimony of Mrs. Daisy S. Kohler.)
estate was probated here. Miss Hardie referred to became Mrs. Clara Kohler. I think I saw the letter which you are referring to.

Letter to Spokane attorneys admitted without objection.

(EXHIBIT 8).

"November 17, 1933

Nuzum & Nuzum
Attorneys at Law
Columbia Building
Spokane, Wash.

Re: DC 14428—James Victor Kohler

Gentlemen:

Last summer we wrote you a letter stating that we were ready and willing to pay the sum due, to-wit: $2,000.00 if it could be decided who was the proper beneficiary so that the company might be relieved of all responsibility. We stated to you at that time that Attorney Paul W. Smith, Penwell Block, Helena, Montana, represented Mrs. Clara Kohler.

We have been waiting since that date for some reply as to whether the parties interested could come to some agreement in regard to how the proceeds would be paid. We will wait a few days longer and unless we hear from you, we will file a bill of interpleader under the Federal Interpleader statute and let the court determine the proper party to whom the benefits should

(Testimony of Mrs. Daisy S. Kohler.)

be paid. We are also writing the attorney at Helena again.

Very truly yours,

JGB:b Ass't to General Counsel."

The Court: Any further examination.

Mr. Acher: I think not. We have no further evidence to introduce.

MRS. CLARA KOHLER

as witness in her own behalf.

Direct Examination

By Mr. Smith:

I am Clara Kohler, defendant herein, wife of J. Victor Kohler at time of his death May 9th, 1933, and named in application for change of beneficiary and referred to in evidence herein. [96]

I recall seeing Daisy S. Kohler September 9th, 1930 in Helena, Montana, in Kohler's Art Store Mr. Kohler and myself being present. I recall a conversation between Mr. Kohler and Daisy S. Kohler about the Yeoman policy. At that time, they were trying to make some kind of agreement or settlement and Mr. Kohler asked her to give up the policy and she agreed to do so if he would give her one thousand dollars in cash. The one thousand dollars was paid. It was my money. I paid the $1000 because I felt that we would get the policy back and have some protection, Mr. Kohler was not well

(Testimony of Mrs. Clara Kohler.)

at the time. The business was not good at that time. I paid the premiums on the insurance policy after September 9, 1930, my money was used. The premiums were made up to the time of his death. I made the payments because the business was bad and I had a little money of my own and I used it for the payments. I claim the benefits under the policy. I was not present at any other meetings as they had most of their meetings away from the store.

Cross Examination

By Mr. MacDonald:

The money I speak of was not paid until the 17th. There was no agreement for the sale of the store at that time, they could not come to any agreement. Daisy had Mr. Smith draw up different papers as Victor would not sign any of them as they were not what he wanted. It was releasing her from her part of the store.

Witness identifies bill of sale for store which is admitted in evidence

EXHIBIT 9.

"Know All Men By These Presents, That I Daisy Kohler, of the City of Helena, County of Lewis and Clark, State of Montana, the party of the first part for and in consideration of one dollar ($1.00) lawful money to me in hand paid by J. Victor Kohler of the said City of Helena, the party of the second part, the receipt where-

(Testimony of Mrs. Clara Kohler.)

of is hereby acknowledged, do by these presents, grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided one-half interest of, in and to the goods, wares, merchandise, fixtures, accounts and good will of the Kohler Art Store, and an undivided one-half interest of, in and to the goods, wares, merchandise, fixtures, accounts and good will of the Kohler Mortuary, being all my interest in and to said Kohler Art Store located at No. 3 North Main Street in said City of Helena and Kohler Mortuary located at No. 4 Jackson Street, in said City of Helena, and all property pertaining thereto, subject to all existing liabilities against said business and each thereof the said party of the second part by accepting this bill of sale assumes and agrees to pay all of said liabilities and agrees to save the said party of the first part harmless of and free from the payment of the same or any part thereof, the party of the first part never having participated in contracting any of said liabilities and never having assumed any responsibility thereof. [97]

To have and to hold the same, to the said party of the second part, his executors, administrators and assigns forever.

(Testimony of Mrs. Clara Kohler.)

In witness whereof, I have hereunto set my hand and seal the ninth day of September 1930.

[Seal] (Signed) DAISY KOHLER

This is not the agreement on which the one thousand dollars was paid, that is just the bill of sale. It was not for the sale of the store that the one thousand dollars was paid it was for the whole agreement.

I was present at the conversation between Victor and Daisy Kohler with reference to the insurance policy. I was standing at the counter in the store. They were standing about twenty feet from me on the other side. They were talking so I could hear. They were not talking to me they were talking to each other. Of course I was not in the conversation but it was all right for me to hear, they knew I could hear. I was interested being the wife. I don't think I mentioned it to any one. Mr. Schroeder came up to the store with Mr. Kohler to get the thousand dollars. We did mention that this was in full settlement of the agreement that was made beforehand. Mr. Kohler and Mr. Schroeder were there, Mrs. Kohler was not there.

The Court: What I want to know is, was Mr. Schroeder acting as Daisy S. Kohler's agent in getting the money?

Mr. Schroeder was really friendly toward the two of them. He was trying to help them come to some

(Testimony of Mrs. Clara Kohler.)

agreement or settlement. They knew Mr. Kohler could not live up to that first agreement. He just didn't have the money. Well, I cannot say there was such bad feeling between me and Daisy S. Kohler in September 1930.

Examination by Mr. Acher

"That is Mr. Kohler's signature which you show me on Exhibit 'C' attached to the complaint, dated in March, 1932, when the affidavit was sent into the company. Later I received a duplicate policy, and after Mr. Kohler's death I sent in that duplicate policy to a bank in Iowa with proof of loss. Attorney Paul W. Smith received a letter back that they could not take the proofs in that way. Then the papers came back and my attorney sent in the papers without the policy [114] direct to the company. I know that the company was at all times willing and ready to pay the money, but did not know who was entitled to it. They never refused to pay.

The Court: Where is the second policy now?

"A. So far as I know both were sent to the company.

"Mr. Smith: I think it is admitted in the pleadings that I have the second policy here.

"The Court: This second policy should be identified and put in the record. Let the record show that the second policy issued by the plaintiff company to the deceased Kohler was received by Mrs.

(Testimony of Mrs. Clara Kohler.)

Clara Kohler's attorney, and that it was marked Exhibit No. 10 for the defendant Mrs. Clara Kohler. Let the record show that it was admitted without objection. I shall expect somebody to produce the by-laws and constitution, in force at the time the policy was issued. And all amendments and additions, if any; the application for membership, the medical examination, etc., in other words, I shall expect to have produced here those things that are specified in Section 6316 of the Revised Codes of Montana.

Proceed: "Exhibit 10 is by this reference made a part hereof and the original exhibit wil be transmitted to the Circuit Court of Appeals.

"Mr. Acher: So far as you know the oral agreement that you have testified to was never called to the attention of the insurance company?

"A. No."

PHILIP SCHROEDER

was called on behalf of Clara Kohler.

My name is Philip Schroeder, Residence, Helena, Montana, am in the real estate business. I know Daisy S. Kohler, Clara Kohler and knew J. Victor Kohler in his lifetime. I recall a conversation with Daisy S. Kohler and J. Victor Kohler in September 1930. The purpose of the meetings was the [115] settlement of the differences between J. Victor

(Testimony of Philip Schroeder.)

Kohler and Daisy S. Kohler—the contracts or agreements which in this case were all mostly alimony settlements—the ones entered into at the time of their divorce.

Mr. Schroeder: Mrs. Kohler, Daisy Kohler, came to my office and explained that she was having great difficulty in securing payments under this alimony agreement and asked for my suggestions as to what might be accomplished to secure her payments under this contract from J. Victor Kohler. This resulted in conferences between Mrs. Daisy S. Kohler and J. Victor Kohler. These conferences were some times held in the office of J. Miller Smith and some times at Brady's office. He was a public accountant. Brady was called in to make an audit of Kohler's business affairs. The object of this was to determine whether or not it was possible to get Mr. Kohler to meet some of these conditions in the alimony agreement. The financial statement made by Mr. Brady indicated that Mr. Kohler's affairs were not in good condition at all and it seemed almost useless to expect him to continue to comply with the terms of this agreement. I suppose a half dozen or more meetings were held and it finally resulted in an offer and acceptance by Mr. Kohler of a settlement of $4,000—$1,000 of that to be in cash. A note was given for the balance of $3,000.00.

The Court: Who were you acting for. Daisy S. Kohler or J. Victor Kohler.

(Testimony of Philip Schroeder.)

A. Something had to be done—I was friendly toward both Daisy S. Kohler and J. Victor Kohler. I could talk to them where they were unable to talk to each other—make suggestions, etc. I was friendly toward both of them, there was no business interest at all.

Mr. Smith: Was the Yeoman's insurance policy mentioned.

A. So far as I recall I never heard the question of the life insurance policy mentioned but once and at that time Daisy Kohler told me that she had in her possession this life insurance policy, explaining that it was a fraternal concern and she asked me if she should not keep it. I suggested that perhaps that policy was of very little value, for two or three reasons—one was that Mr. Kohler could discontinue the premium payments and the other that Kohler's own life expectancy might be 20 or 30 years, and also that the fraternal [99] association might not last as long as he lived. So I suggested to her that she just drop the insurance matter and say nothing more about it. That is the only time I ever heard the matter mentioned at all. They, themselves, might have talked it over at times, but I heard of it only once, just as I said. The $1,000.00 was handed to me along with the note—the note and check for $3,000. I had no knowledge of whose money it was. It was a cashier's check issued by the Union Bank, so it did not indicate whose money it was, or from what source it came. I could not say to whose order it

(Testimony of Philip Schroeder.)

was payable, but I take it for granted that it must have been to Daisy S. Kohler, so I would have to answer that it was Daisy S. Kohler. The note was not signed by Clara Kohler. I seldom, if ever, talked with Clara Kohler. She was always in the back ground. All negotiations were with J. Victor Kohler. The $1,000 was part payment, along with the note.

The Court: What was this part payment for.

Mr. Kohler acknowledged an indebtedness of $4,000. He said he could not pay the $4,000 in cash, but he could pay $1,000 in cash, and he said "I can give you and will give you a note for $3,000 payable on a monthly payment plan. That was intended to be a settlement of all these matters described by an agreement known as an alimony agreement.

The Court: In other words, it was in settlement of the alimony agreed on.

That was my understanding.

Cross Examination

By Mr. MacDonald:

The note is dated September 9th and the check which Mr. Kohler gave was delivered on the 17th, so it would be safe to say that the matter was finally settled and closed on the 17th of September. Mr. Kohler signed the note and delivered the check. Delivery was made in the Kohler Store.

The Court: Who was there at the time of delivery. Who was the note delivered to.

(Testimony of Philip Schroeder.)

A. Mr. Kohler and myself. I don't recall that Daisy Kohler was there or not. I think not. The check was delivered to me and taken to J. Miller Smith's office by myself.

Q. I delivered it to J. Miller Smith. I could not say if Daisy Kohler was there at the time. J. Miller Smith was Daisy Kohler's lawyer. [100]

Referring to Exhibit A this is the bill of sale from Daisy S. Kohler to J. Victor Kohler of an undivided one-half interest in the mercantile business. They were delivered at the same time—part of the same transaction.

I acted for neither Victor nor Daisy S. in one sense. I was friendly with the both of them and acted as a go-between.

Q. This agreement was finally made upon this particular sum of money.

A. In Judge Smith's office, and I then went to Mr. Kohler's store and repeated this proposal that he pay $4,000, having in mind also that the sum of money must be within Mr. Kohler's ability to pay, and it was thought under the circumstances that Mr. Kohler never could meet any obligation greater than this $4,000.00. Mr. Kohler accepted that proposal when I went up to his store and told him about it.

Q. Do you know exactly what the agreement was.

A. Well, as near as anyone; it apparently was not reduced to writing, at least not to my knowledge. My understanding of the negotiations and

(Testimony of Philip Schroeder.)

conversations was that owing to the fact that the alimony agreement was so burdensome and could not possibly be complied with, this agreement was to supercede that whole agreement, and this was to be a new one.

Q. When, definitely, did Daisy Kohler agree to that arrangement.

A. Well, it was just an accummulation of a half dozen meetings. I couldn't put my finger on any particular minute. The agreement was entered into, however, to the effect that Mrs. Kohler was to sell to J. Victor Kohler her one-half of the Kohler Art Store and Kohler Mortuary. That was embodied in the bill of sale. And that bill of sale is here in evidence. It was part of the negotiations—the bill of sale.

The Court: To clarify the record. Do you not state that the purpose of that bill of sale was to prevent Mrs. Daisy S. Kohler from becoming liable for the debts of the business.

A. That was an inducement, I suppose.

The Court: To be exact, wasn't that bill of sale given for the purpose of preventing any such liability on her part. [101]

Mr. MacDonald: Your Honor, we have no such record in evidence. She stated she wanted to sell the business . . .

The Court: Yes, she stated that was one of the reasons that she wanted to sell the business. She was advised by Mr. Schroeder that she should do so.

(Testimony of Philip Schroeder.)

Mr. MacDonald: I don't remember any such statement.

The Court: It was made, Proceed.

The bill of sale was a part of the general settlement: it was subsequent to the negotiations. Mrs. Kohler deeded this one-half interest in the mercantile business to Mr. Kohler and Mr. Kohler in turn paid by note and check in the sum of $4,000.00—$1,000 in cash and note for $3,000.00. The main object in making this bill of sale and in getting Mr. Kohler to accept it was so that she might be relieved of any further financial responsibility in the event of bankruptcy—if that makes it clear.

The Court: That is clear.

Mr. MacDonald: That is all.

Rebuttal

MRS. KOHLER (DAISY S.)

I never did have any agreement with J. Victor Kohler in September 1930 with reference to my turning over to him the insurance policy in question in this case. Mr. Kohler never mentioned the policy to me. I heard the testimony of Clara Kohler with reference to your having a conversation with Victor Kohler in the store in September 1930 at which it was agreed to return to him the policy in question. Such a conversation did not take place. I never mentioned the policy to him nor he to me at any time. I knew nothing about it until Mr.

(Testimony of Mrs. Daisy S. Kohler.)

Schroeder wrote me. The court can see by my letter.

"The Court: Until the Court is put in possession of all the necessary papers in this case, including the application for insurance, by-laws and constitution of the plaintiff company and any amendments thereto, the medical examination of the insured, signed by the applicant, the Court will withhold a decision. The Copy of the by-laws should be signed by the secretary or corresponding officer under the seal of the plaintiff company.

"The Court: Let the record show that the constitution and by-laws and any changes or amendments thereof are to be delivered to the Court by the counsel for the plaintiff with the certificate [116] of the secretary of the society under the seal of the plaintiff here to the effect that they are the by-laws and constitution in force at the time of the issuance of the first policy, at the time of the issuance of the second policy, and at the time of the death of the deceased Kohler. What time do you wish to have to present your findings of fact, and conclusion of law."

MR. PAUL W. SMITH

called as a witness for the plaintiff, being duly sworn testified as follows:

"My name is Paul W. Smith. I acted as attorney for Mrs. Clara Kohler in negotiations between her and the insurance company before this Bill of

(Testimony of Paul W. Smith.)

Interpleader was filed. Upon your showing me Exhibit I which has already been admitted in evidence, I recall writing the letter on November 20th to the Insurance company, which suggests that a suit in interpleader should be filed. I recall receiving a letter from the insurance company, which is set forth as Exhibit 11. (Whereupon Exhibit 11 was offered in evidence without objection and is herein by this reference made a part hereof, the original thereof to be transmitted to the Circuit Court of Appeals.

"Q. This is identical with Exhibit 8, which has been read, addressed to the attorneys in Spokane, Washington, to the effect that the suit would be filed if they could not come to an agreement. Now, Mr. Smith, in Exhibit 1, the letter from The Yeoman Mutual Life Insurance Company on June 29th, discussing this matter, they say:

"We understand that her (Daisy S. Kohler) claim is based upon a property settlement between Daisy Kohler and Victor Kohler, executed February 20, 1929.

"We do not have a copy of this decree nor do we know whether, if the same is as we have been advised, the court can enforce it.

Q. You never sent them a copy.

A. No.

Q. You never sent them any statement of the new agreement, did you.

A. Not that I recall."

Thereafter, pursuant to the aforesaid order of the court on February 11, 1936, the plaintiff filed in the above entitled action certified copies of certain documents referred to in the certificate of the Judge, which said documents are by this reference made a part hereof, the original exhibits to be transmitted to the circuit court of appeals.

It is stipulated that the foregoing may be settled and certified to as the testimony in narrative form essential to the appeal herein.

WELLINGTON D. RANKIN
ARTHUR P. ACHER
Attorneys for Plaintiff.
PAUL W. SMITH
DAVID R. SMITH
Attorneys for Defendant
Clara Kohler.
T. H. MacDONALD
Attorney for Defendant
Daisy S. Kohler. [117]

CERTIFICATE.

The undersigned, James H. Baldwin, United States District Judge, in and for the District of Montana, and the Judge before whom said cause was tried, hereby certifies that the foregoing is a true and correct narrative statement of the evidence in the above entitled cause, other than exhibits as follows:

Exhibits Nos. 1, 10, and 11.

11 certified copies of the Constitution and By-Laws of the plaintiff corporation dating from 1901 to 1932, inclusive, issued as follows: 1901, 1906, 1909, 1913, 1917, 1921, 1924, 1925, 1928, 1929, 1932, together with Book on laws of Iowa relating to insurance issued in 1921 and book on the laws of Iowa relating to insurance issued in 1931, together with photostatic copies of papers as follows: photostatic copy of the application for membership and medical examination which was filled out in 1900; photostatic copy of specimen certificate like that which was issued to the insured in May 1900; photostatic copy of the application for exchange of certificate, that is, from the certificate issued in 1900 for the one issued in 1923 and the one that is at issue in this case; certificate issued July 26, 1923; application for change of beneficiary; application for duplicate benefit certificate dated March 5, 1932; photostatic copy of the certificate which was re-issued on March 10, 1932, in which an application for change of beneficiary shows that the insured designated Clara Kohler—attached to said certificate will also be found the application for duplicate benefit certificate; photostatic copy of the proofs of death submitted by Mrs. Clara Kohler; photostatic copy of proofs of death submitted by Daisy S. Kohler;

referred to in said statement and incorporated therein by reference; and it appearing to the Court

necessary and proper that the aforesaid original exhibits should be inspected in the Circuit Court of Appeals upon the appeal herein;

It Is Ordered, that the foregoing exhibits incorporated in the statement of the evidence by reference be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals at San Francisco, California, and returned after the disposition of said appeal to the Clerk of this Court, and that the foregoing statement be, and the same is, by me, now duly settled, allowed and approved as the statement of the evidence in the above entitled cause.

Dated this.....day of August 1937.

.....

District Judge.

Received by the Clerk and filed this April 30, 1938.

C. R. GARLOW,
Clerk. [118]

Thereafter, on April 30, 1938, a Stipulation in re substitutions and additions to the Proposed Statement of Evidence was received by the Clerk and filed herein, being in the words and figures following, to-wit: [110]

[Title of District Court and Cause.]

STIPULATION.

It is stipulated that the attached pages may be substituted for pages in the original "proposed testimony to be included in transcript on appeal" as follows:

1 and 1a for page 1; 11 and 11a for page 11; 15 and 16 for page 15 (the latter stipulating to the correctness of the entire document) and that the words "I think I saw the letter which you are referring to" (referring to exhibit B) to be inserted after the words "Clara Kohler" on line 11 of page 9 and the words "(Exhibit 8)" after line 12 on page 9 and that the original "proposed testimony" when so amended may be certified by the Court.

WELLINGTON D. RANKIN
ARTHUR P. ACHER
Attorneys for Plaintiff.
PAUL W. SMITH
DAVID R. SMITH
Attorneys for Defendant
Clara Kohler.
T. H. MacDONALD
Attorney for Defendant
Daisy S. Kohler.

[Clerk's Note: The pages referred to in the above stipulation have been incorporated in the testimony.] [111]

Thereafter, on July 19, 1937, Praecipe for Transcript of Record was duly filed herein, being in the words and figures following, to-wit: [103]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court, for the District of Montana:

Please prepare a record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include the following:

(1) Findings of fact, conclusions of law and order of the court.
(2) Decree of the court.
(3) Assignment of errors.
(4) Appeal.
(5) Allowance of appeal.
(6) Cost bond.
(7) Citation on appeal.
(8) This praecipe.
(9) Testimony.

All captions and indorsements may be omitted, and you are requested to forward typewritten transcripts to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules of this court.

T. H. MacDONALD
Solicitor for Defendant,
Daisy S. Kohler.

Personal service of within Praecipe made and admitted, and receipt of true copy thereof acknowledged this 17th day of July, 1937.

WELLINGTON D. RANKIN
ARTHUR P. ACHER
Attorneys for Plaintiff.
PAUL W. SMITH &
DAVID R. SMITH
Attorneys for Clara Kohler.

[Endorsed]: Filed July 19, 1937. [104]

Thereafter, on April 16, 1938, Certified copy of Order of the United States Circuit Court of Appeals, Ninth Circuit, continuing motions and extending time to file Transcript was duly filed herein, being in the words and figures following, to-wit: [105]

At a Stated Term, to wit: The October Term A. D. 1937, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the Twelfth day of April in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding,

Honorable William Denman, Circuit Judge,

Honorable Clifton Mathews, Circuit Judge.

No. 8812.

DAISY S. KOHLER,

Appellant,

vs.

CLARA KOHLER,

Appellee.

ORDER CONTINUING MOTIONS, AND EXTENDING TIME TO FILE TRANSCRIPT.

Upon consideration of the motion of appellee, filed April 4, 1938, for dismissal of the appeal herein for the non-compliance by the appellant with the provisions of Subdivision 1 of Rule 16 of the Rules of Practice of this Court, and of the motion of appellant, filed April 11, 1938, for denial of said motion, and further relief, and good cause therefor appearing,

It Is Ordered that said motions be, and they hereby are continued; and

It Is Further Ordered that appellant herein be, and hereby is granted to and including May 12, 1938, within which to file with the clerk of this court a certified transcript of record in above cause.

[106]

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 12th day of April, A. D. 1938.

[Seal] PAUL P. O'BRIEN,
Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed April 16, 1938.

Thereafter, on April 19, 1938, Second Praecipe for Transcript of Record was duly filed herein, in the words and figures following, to-wit: [107]

[Title of District Court and Cause.]

SECOND PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the District of Montana:

Please prepare and forward a record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include the following:

All papers mentioned in the original "Praecipe for transcript of record" filed herein and in addition thereto the "stipulation" of all parties hereto to be attached to the evidence to be used on the appeal and making the substitutions and additions to the original "proposed evidence" as provided in

said stipulation and a copy of the "order of the Circuit Court of appeals for the ninth Circuit" dated April 12th, 1938, and this praecipe.

Signed T. H. MacDONALD
Attorney for Defendant
Daisy S. Kohler. [108]

Copy had and service admitted this 19th day of April 1938.

W. D. RANKIN
A. P. ACHER
Attorney for Plaintiff.

Copy had and service admitted this 19th day of April 1938.

PAUL W. SMITH
DAVID R. SMITH
Attorney for Defendant
Clara Kohler.

[Endorsed]: Filed April 19, 1938. [109]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 118 pages, numbered consecutively from 1 to 118 inclu-

sive, is a full, true and correct transcript of all portions of the record and proceedings in case No. 1494, Yeomen Mutual Life Insurance Company, etc., vs. Mrs. Clara Kohler, et al., which have by praecipe been designated to be incorporated into said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Twenty and 95/100 Dollars, and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this May 7th, A. D. 1938.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER
Deputy. [119]

[Endorsed]: No. 8812. United States Circuit Court of Appeals for the Ninth Circuit. Daisy S. Kohler, Appellant, vs. Yeoman Mutual Life Insurance Company and Clara Kohler, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 12, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit: The October Term A. D. 1937, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixth day of June in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding,

Honorable William Denman, Circuit Judge,

Honorable Clifton Mathews, Circuit Judge.

No. 8812.

DAISY S. KOHLER,

Appellant,

vs.

CLARA KOHLER,

Appellee.

ORDER DENYING MOTION TO DISMISS APPEAL.

The motion of appellee Kohler, filed April 4, 1938, to dismiss the appeal herein for failure of appellant to file the transcript of record and docket the cause in this court having been heard on April 11, 1938, and order entered April 12, 1938 permitting the appellant until May 12, 1938, to file the certified tran-

script of record in the cause and continuing said motion to dismiss, and it appearing that the said transcript of record was filed on May 12, 1938, Now, Therefore,

It is ordered that the said motion of appellee to dismiss the appeal herein be, and hereby is denied.

NO._____

United States
Circuit Court of Appeals
for the Ninth Circuit

DAISY S. KOHLER,

Appellant,

vs,

YEOMAN MUTUAL LIFE INSURANCE COMPANY and CLARA KOHLER,

Appellees.

Petition for Rehearing

T. H. MacDONALD,
of Helena, Montana,

Attorney for Appellant and Petitioner.

Filed....., 1939.

.....Clerk.

NO._____

United States
Circuit Court of Appeals
for the Ninth Circuit

DAISY S. KOHLER,

Appellant,

vs,

YEOMAN MUTUAL LIFE INSURANCE COMPANY and CLARA KOHLER,

Appellees.

Petition for Rehearing

The Court is respectfully requested to grant a rehearing for the following material matters of law apparently overlooked by the court:

1.

The Court held (Printed Opinion, page 4): "The change of beneficiary from Appellee was in conformity with insurers by-laws and was valid and effective notwithstanding the contract of February 20th, 1929,

between decedent and appellant wherein decedent agreed that appellant should remain his beneficiary."

Insurer *waived all of its by-laws* by interpleading the contesting claimants and they cannot be taken advantage of by any one but insurer.

See appellant's brief, pages 9 and 10 and Iowa authorities therein cited to-wit: Thomas vs. Locomotive Engineers, 191 Iowa 1163, 133 NW. 628, 15 L. R. A. on page 125 and citing Holden vs. Modern Brotherhood, 151 Iowa 673, 132 NW. 329.

(We cite only Iowa cases, but find this rule universally followed.)

II.

This Court held (Opinion, page 4): "Insurer being a Fraternal Beneficiary Association incorporated in Iowa, the rights of its members and beneficiaries must be determined by the laws of that state."

Iowa Statute Sec. 8788, provides:

> "No beneficiary shall have or obtain any vested interest in said benefit until the same shall become due and payable upon the death of said member."

Insofar as it purported to give appellant a vested interest in the death benefit here involved the contract of February 20, 1929, was illegal and void."

The Court apparently overlooked the decisions of

the Supreme Court of Iowa on this section. In three decisions, all recent, the Supreme Court of Iowa approved the decisions set forth on appellant's brief, pages 7, 8 and 9.

See Beed vs. Beed, 207 Iowa 934, 222 NW. 442.

Jacobson vs. New York Life, 199 Iowa, 770, 202 NW. 578.

And in holding that the rule in the above cases applies to Fraternal Benefit Societies:

Sovereign Camp W. O. W., vs. Russell, (March 1932), 214, Iowa 39, 241 NW. 395

We quote:

"In some respects the cases of Beed vs. Beed, 207 Iowa 954, and Jacobsen vs. New York Life Ins. Co., are very similar to the instant case. In the Jacobsen case there was reserved the right to change the beneficiary which right existed in the case at bar. In that case we endorsed this rule:

> " 'The rule in this state is, that while the assured may, *in the absence of intervening equities,* change at will the beneficiary named in the insurance policy, equitable rights may be acquired in a beneficiary certificate of insurance which a court of equity will recognize and enforce'."

We followed this doctrine in the Beed case, supra, which seems to be the *universal doctrine in this country.*

See Locomotive Engineers Mutual Life and Accident Assurance Company vs. Waterhouse 257 S. W. (Texas) 304; Columbian Circle vs. Mudra, 132 N. E. 213; Gaston v. Clabaugh, 186 Pac. (Kans.) 1023; Supreme Council of Royal Arcanum v. Alexander, Atl. (N. J.) 276; Supreme Council of Catholic Benevolent Legion v. Murphy, 55 Atl. N. J. 497; McKeon v. Ehringer, 95 N. E. 604 (Ind.); Savage v. Modern Woodmen, 113 Pac. 9 Kans. 802; Great Camp K. O. M. v. Savage, 98 N. E. (N. Y.) 197; Stronge v. Supreme Lodge K. of P., 12 L. R. A., N. S. (N. Y.) 1206. Followed by an exhaustive note on this subject; Savage vs. Modern Woodmen of America, 33 L. R. A., N. S. (Kans.) 773, followed by a note on the same subject; Jory v. Supreme Council American Legion of Honor, 26 L. R. A. (Cal.) 733.

Each and all of the cases last cited, together with our own cases, hold to the general rule that where an agreement of this kind is made and carried out by a party other than the assured, such party acquires, in equity, a vested interest, in the proceeds of the policy of which, in the absence of countervailing equities, he cannot be deprived. What is here said is to meet the contention of appellee that the Iowa cases cited were not Mutual Benefit Society

policies, and therefore the *Iowa rule* would not apply to the sort of policy we have in this case. All the cases above cited are cases, where the policy was issued by mutual societies, and *therefore no distinction can be made in this respect as to the kind of corporation which issued the policy.*"

The opinion then goes on to deny relief to appellee on the ground that Iowa has a special statute in the particular case where the "agreement not to change the beneficiary" is based on a consideration of paying the assessments. "Expressio Unis est Exclusio Alterius."

We submit that the law in Iowa is as contended for by appellant and that these decisions were overlooked by the court.

III.

We quote from the opinion, page 5:

> "Appellant complains of the trial courts finding that, by the contract of September 9, 1930, appellant agreed to relinquish the certificate and all her rights thereunder. The evidence tho conflicting, supports the finding. We conclude, therefore, that assuming its validity, the contract of February 20, 1929, insofar as it related to the certificate was abrogated by the contract of September 9th, 1930."

We submit that the court has overlooked that this

contract (if it was one) and both contracts involved were Montana contracts and they at least were governed by the laws of Montana.

See 12 C. J. Conflict of Laws, Art. 30, "Place of Making."

Appellant's brief, page 14, sets out the Montana Statute 7569 R. C. M. 1921 and 1935:

> "A contract in writing may be altered by an executed oral agreement and not otherwise." (Note this is a law of contract and not a rule of evidence) and
>
> "An oral agreement is not executed unless its terms have been fully performed and performance on one side is not sufficient.'
>
> Continental Oil vs. Bell, 94 Mont. 123, on page 134-21 Pac. 2nd 65.

Apparently these points were overlooked by the Court.

It is respectfully petitioned that a rehearing be granted.

Signed, T. H. MacDONALD,
Attorney for Appellant.

T. H. MacDonald certifies that he is attorney for the appellant in this action and that the foregoing petition in his judgment is well founded and is not interposed for delay.

T. H. MacDonald